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Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

October Term, 1985

VINOD C. PATWARDHAN,
Petitioner

v.

SAN ANTONIO COMMUNITY HOSPITAL,
a Non-Profit Corporation,
Respondent.

BOARD OF TRUSTEES OF SAN ANTONIO
COMMUNITY HOSPITAL and DOES 1 through 100,
Real Parties In Interest.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL AND APPENDIX

LAWRENCE SILVER
A Law Corporation
LAWRENCE SILVER
LOUIS M. NATALI, JR.
9100 Wilshire Boulevard
Suite 360 West Tower
Beverly Hills, CA 90212
Attorneys for Petitioner

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600.

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QUESTIONS PRESENTED

1. Whether a licensed physician in the State of California is entitled, by virtue of the Due Process Clause, to be represented by retained counsel at a hospital administrative hearing to determine whether he shall be admitted to the hospital staff.

2. Whether the hospital's use of its own attorney as hearing officer at the Appellate Review Hearing was a violation of the Due Process Clause.

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PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL AND APPENDIX

I.

INTRODUCTION

The petitioner, Vinod C. Patwardhan, requests that a Writ of Certiorari issue to review the judgment and opinion of the California Court of Appeal entered on October 22, 1985.

A. Opinion Below.

The unreported opinion of the California Court of Appeal, Fourth District appears in the Appendix A. The California Supreme Court, within its discretion, declined

to grant a timely Petition for Hearing and issued no opinion.

B. Jurisdiction.

The California Supreme Court denied the Petition for Hearing on February 14, 1985. This Petition for a Writ of Certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

C. Constitutional and Statutory Provisions.

This Petition involves the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Sections 805 and 805.5 of the California Business and Professions Code.

II.

STATEMENT OF THE CASE

Petitioner, Vinod C. Patwardhan, an immigrant from India and a physician duly licensed to practice medicine by the California Bureau of Medical Quality Assurance, won the right to a hearing at respondent hospital on the question of whether or not he should be admitted to the medical staff of that hospital.[1] This hearing is provided for by the hospital by-laws,[2] and these by-laws and procedures followed therein have been recognized as quasi administrative in nature by the California Supreme Court and the California Legislature. Prior to the hearing petitioner made a timely request to be represented at the

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[1]The Superior Court for the County of San Bernardino granted a writ of mandate ordering respondent to hold a hearing on his application.

[2]The relevant portion of the by-laws are contained in Appendix C.

evidentiary hearing by counsel he had previously retained. This request was denied by the hospital. Petitioner was advised that he could be represented by a medical practitioner of his choice, however, petitioner, unable to secure such a representative, represented himself. In part because of petitioner's lack of understanding of the nature of the proceeding, in part based on petitioner's lack of basic knowledge of American proceedings of an adversarial nature, and in part because of petitioner's language difficulties, the hearing is replete with petitioner's errors of strategy, tactics, and contains many hostile exchanges between the hearing committee, a group of staff physicians selected by the hospital to hear the matter, and petitioner. These errors would have undoubtedly never occurred had petitioner been represented by legal counsel. At the end of the hearing, petitioner was denied admission to the medical staff. Thereafter he took an appeal to the Appellate Review Committee of the Hospital Board of Trustees which also denied relief. The hospital's attorney presided over the Appellate Review Committee, gave it legal advise, and refused to consider or rule upon petitioner's questions concerning the bias of the members of the Appellate Review Committee.

Subsequently, petitioner again sought relief by Petition for Writ of Mandate in the San Bernardino Superior Court and his application was denied after hearing. Petitioner's timely appeal to the California Court of Appeal resulted in an affirmance of the trial court order. A Petition for Hearing to the Supreme Court of California was denied. The due process issue was raised at all stages of the proceeding and was denied by the California Superior Court and the California Court of Appeal.

III.

REASONS FOR GRANTING THE WRIT

A. The Due Process Clause Applies To A Hospital Proceeding Denying A Physician Membership On The Medical Staff.

The increasing oversupply of physicians in the United States and more particularly in California,[3] has caused an increasing burden upon physicians seeking to be admitted to practice at certain hospitals. This increasing competition has caused a noted increase in the number of hospital hearings, of an adversary nature, to occur. The California courts have held, as detailed below that these hearings are subject to the Due Process Clause of the Constitution of the United States. The California General Assembly has passed legislation which controls, in part, how the proceedings are conducted, how the proceedings are reviewed,[4] immunity for physicians who serve on hospital judicial review committees,[5] the confidentiality of the

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[3]"The number of physicians practicing in California continued to climb in 1983, the latest year for which statistics are available, augmenting what many observers believe to be an existing oversupply of physicians in the state." Purdy, "Physician Supply in California, 1983", XXVI, *Socioeconomic Report*, page 1, (Calif. Medical Ass'n, 1986). The report goes on to say that with the exception of ear, nose and throat specialists, "all other surgical specialties are oversupplied" and "the supply of physicians in California is more than 16 percent greater than recommended by [the Graduate Medical Education National Advisory Committee]."

[4]Section 1094.5 of the California Code of Civil Procedure establishes that a proceeding entitled a petition for writ of mandate is to be utilized to review the hospital hearing on physician staff membership. Section 1094.5(h)(1)(2) and (3) specifically refer to hospital hearing of the type involving petitioner.

[5]Section 43.7 of California's Civil Code provides an immunity for "any member of any peer review committee whose purpose is to

proceedings and the records of the judicial review committees,[6] and certain consequences which follow an adverse determination to a physician.[7] Governmental involvement and governmental action controls, in part, the procedure and establishes the consequences of these hearings. Neither the California judicial system nor the California General Assembly has recognized the right of a physician to be represented by a retained lawyer at these proceedings when an adverse determination can have dire consequences to a physician. This Petition seeks this Court's determination that such a right exists under the federal constitution. Research discloses that this Court has not previously addressed this issue.

The federal constitutional provision that petitioner not be deprived of property without due process of law guarantees him the right to retained counsel at hospital disciplinary proceedings. In *Goldberg v. Kelly,* 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), this court determined that welfare recipients who faced a hearing at which their benefits were to be terminated were entitled to be represented by retained counsel. Since *Goldberg,* most of this court's teachings concerning due process and the right to counsel in non-criminal cases have dealt with requests for appointed counsel. Since there is no analyti-

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review the quality of medical . . . services rendered by physicians and surgeons. . . ." Section 47 of California's Civil Code provides an absolute privilege if a statement is made "in any other official proceeding authorized by law."

[6]Section 1156 of the California Evidence Code precludes discovery of the "proceedings or records of organized committees of medical . . . staffs of hospitals having the responsibility of 'evaluation and improvement of the quality of care rendered in the hospital' . . .". The section also makes confidential any testimony of any witness of the events which transpired at the hearing or proceedings.

[7]See Sections 805 and 805.5 of the California Business and Professions Code contained in Appendix B.

cal framework established by this Court to judge a request for representation by retained counsel rather than appointed counsel, without conceding that it is a wholly appropriate analytical framework in a "request for a retained counsel case", this Petition will analyze the question utilizing the factors considered appropriate in appointed counsel non-criminal cases. This case satisfies those factors. This court has held that three factors are to be taken into account. These are: the private interests at stake, the governmental interests at stake, and the risk that the procedures used will lead to erroneous decisions. The court has held that these factors are to be balanced against each other, and their net weight set against the presumption that there is no right to appointed counsel, implying a right to retained counsel. See *Lassiter v. Department of Social Services,* 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981); *Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 46 L.Ed.2d 18 (1976).

1. A California Physician Has A Property Interest In Seeking Admission To A Hospital Staff.

Under California law, a medical doctor who is denied admission to a hospital medical staff suffers the detriment that this denial must be reported to the Board of Medical Quality Assurance, the California licensing agency for physicians. See California Business and Professions Code Section 805 printed in Appendix B. In addition, when this doctor seeks to renew his staff privileges at a hospital where he enjoys them, California law requires that this hospital contact the Board of Medical Quality Assurance for a report of whether or not the physician has been denied membership at any other hospital. See California Business and Professions Code Section 805.5, printed in Appendix B. Failure to use the reporting requirements provided by law is a misdemeanor. A California court has determined that a notice wrongfully sent to the Board of

Medical Quality Assurance constitutes "irreparable harm". See *Haller v. Burbank Community Hospital Foundation,* 149 Cal.App.3d 650, 197 Cal.Rptr. 45 (1983).

As a result of any hospital employing the procedure outlined above, it is likely that a medical doctor who is wrongfully denied membership at a hospital will be serverely prejudiced in the eyes of other hospitals where he enjoys membership privileges. These hospitals can institute investigations and bring charges against him based on what has occurred at other hospitals. Indeed, California law requires that hospitals have a duty to monitor the quality of their staffs and the failure to do so may be negligence. See *Elam v. College Park Hospital,* 132 Cal.App.3d 332, 183 Cal.Rptr. 156, 164-166 (1982). Hospitals, understandably, are reluctant to admit to staff membership any physician who has been denied staff membership at another hospital. A denial of staff privileges, regardless of how wrong the procedure was in causing the denial or how wrong the physician panel may have been in reaching its decision, is often a black ball rolled against that physician which cannot be overcome.

Therefore, the interest of the petitioner is high. This court has indicated that in determining whether due process applies, it is necessary to look to the *nature* of the interests at stake, not the weight. *Goss v. Lopez,* 419 U.S. 565, 575-76, 42 L.Ed.2d 725, 95 S.Ct. 729 (1975); *Board of Regents v. Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). In *Goss* the court held that a ten (10) day suspension from public school was sufficiently important interest to require due process. Similarly, this court has held that if there is a deprivation of property, then the Due Process Clause would apply. See *Sniadach v. Family Finance Corporation,* 395 U.S. 337, 342, 23 L.Ed.2d 349, 89 S.Ct. 1820 (1969); *Boddie v. Connecticut,* 401 U.S. 371, 378-79, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971); *Board of*

Regents v. Roth, supra, at 570 note 8, 33 L.Ed.2d 548. The court held in *Goss, supra,* that a ten day suspension from school is not de minimis "and may not be imposed in complete disregard of the due process laws". It is important to point out that in *Goss* the court stopped short of providing an absolute right to counsel but held that the school disciplinarian should exercise his discretion in making that determination.

2. A Hospital Admission Hearing Is Adversarial In Nature.

A California hospital admission or disciplinary hearing is an evidentary and adversary hearing in which the California courts have held that a physician is entitled to notice of the charges, the right to call and confront witnesses, the right to inspect in advance relevant charts, documents and other written material which will be used against him, and to introduce similar physical evidence. Such a hearing is presided over by a hearing officer and is recorded by an official court reporter. The hospital designates a staff physician to present the charges. See Article IX of this hospital's by-laws contained in Appendix C. California courts have continuously recognized that a physician's right to practice medicine and his access to medical staffs and medical societies is "a practical prerequisite of a medical or dental specialty" and as such is protected by "due process and fair procedures." See, *e.g., Ezekial v. Winkley,* 20 Cal.3d 267, 271-72, 570 P.2d 32, 142 Cal.Rptr. 418 (1977); *Anton v. San Antonio Community Hospital,* 19 Cal.3d 802, 140 Cal.Rptr. 442 (1977); *Pinsker v. Pacific Coast Soc. of Orthodontists,* 1 Cal.3d 160, 166, 460 P.2d 495, 81 Cal.Rptr. 623 (1969);

Ascherman v. St. Francis Memorial Hospital, 45 Cal.App.3d 507, 511-12, 199 Cal.Rptr. 507 (1975).[8]

3. The Due Process Clause Requires Procedural Protection At A Hospital Admission Hearing.

Under California law, a physician has a protected right to a hearing with all its attendant features, notice, and an opportunity to be heard. This Court has held that once a person has a legitimate claim to a state right he may demand the procedural protections of due process. This applies to continued employment, *Connell v. Higginbotham*, 403 U.S. 207, 91 S.Ct. 1772, 29 L.Ed.2d 418 (1971); *Wieman v. Updegraff*, 344 U.S. 183, 191-192, 73 S.Ct. 215, 97 L.Ed. 216 (1952), welfare benefits; *Goldberg v. Kelly, supra*, parole revocation; *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct 2593, 33 L.Ed.2d 484 (1972), prison good time credits; *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) and even the right to one's "good name, reputation, honor or integrity; *Wisconsin v. Constanineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971); *Board of Regents v. Roth*, 408 U.S. 564, 573, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

In *Wisconsin v. Constantineau, supra*, this Court held that a statute which enabled a local police chief to post a notice in all retail liquor outlets banning sales to Ms. Constantineau violated due process because it provided no notice. The Court held that "[W]here a person's good name, reputation, honor or integrity is at stake because of

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[8]Although the California courts have recognized such rights and significant interests involved, they have nonetheless held the physician to a standard of creating a proper record, recording proper objections, making timely challenges in a form required of skilled advocates, lawyers. See, for example, *Anton v. San Antonio Community Hospital*, 19 Cal.3d 802, 827, 140 Cal.Rptr. 442, 456-57 (1977); *Cipriotti v. Board of Directors*, 147 Cal.App.3d 148, 156-57, 196 Cal.Rptr. 367, 373-74 (1983).

what the government is doing to him, notice and an opportunity to be heard are essential." 400 U.S. at 437, 95 S.Ct. at 735. Similarly, in *Goss v. Lopez, supra*, the Court held that even a ten day suspension from public school "could seriously damage the student's standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education." 419 U.S. at 573, 95 S.Ct. at 735. The *Goss* majority noted that four of twelve randomly selected Ohio colleges specifically inquire about high school suspension on their respective applications. 419 U.S. at 575 n. 1, 95 S.Ct. at 736, n. 1. This court made clear in *Board of Regents v. Roth, supra*, that if a decision denying continued employment "imposed a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities", this would violate due process. 408 U.S. at 573-74, 92 S.Ct. at 2707, and cases cited therein. Each of these elements of due process; a property interest, good name, foreclosed employment, and the possibility of stigma, are here implicated.

The operation of California law, however, does, in this context, impose a stigma on petitioner's good name, honor, reputation and integrity which "forecloses his freedom to take advantage of other employment opportunities" and "seriously damages" his standing in the eyes of "his peers" and other hospital staffs.

The reporting provisions of California's Business and Professions Code provides that every hospital denying staff admission to a physician must report such denial to the Board of Medical Quality Assurance. Section 805, Business and Professions Code. Thereafter, before renewal of privileges, every hospital where a physician enjoys staff privileges:

> "Shall request a report from the Board of Medical Quality Assurance, the Board of Osteopathic Exam-

> iners, or the Board of Dental Examiners to determine if any report has been made pursuant to Section 805 indicating that the applying physician or surgeon, clinical psychiatrist, podiatrist or dentist has been denied staff privileges, been removed from a medical staff or had his staff privileges restricted as provided by Section 805". California Business and Professions Code, § 805.5, as amended (1979).

Any institution or medical staff failing to comply with the provision of § 805.5(a)(1) is guilty of a misdemeanor punishable by a fine of not less than $200 nor more than $1,200.

The economic effect of California law means that a doctor who seeks to join a hospital or medical staff "a practical prerequisite to a medical specialty" runs the risk that a denial of his application will be investigated by both the Board of Medical Quality Assurance which issues him his license and by any hospital where he presently enjoys membership which issues him a pay check or allows him to admit patients.

In addition, every hospital staff application requests information concerning denial of membership. So a hospital may in violation of due process deny membership and create the whipsaw effect on a doctor's good name, reputation, foreclose future employment opportunities, and in effect stigmatize a practitioner for life.

The reporting impact of § 805.5 has never been considered by the California Supreme Court. The Court of Appeal considered this issue in this case but rejected it on the grounds that several appellate decision since 1979 have upheld a denial of retained counsel at such hearings. (See Slip Opinion, pp. 7-8.) None of these cases dealt with this issue — the right to retained counsel at the judicial review committee hearing. *Cipriotti v. Board of*

Directors, 147 Cal.App.3d 148, 196 Cal.Rptr. 367 (1983) involved a hospital's appeal from the grant of a writ of mandate and the issue of the right to counsel was not before the court. In *Haller v. Burbank Community Hospital Foundation*, 149 Cal.App.3d 650, 197 Cal.Rptr. 45 (1983), the court found irreparable harm and ordered a withdrawal of the Board of Medical Quality Assurance notice. The holding in *Haller* supports a right to retained counsel on the face of § 805.5. Finally, the Court of Appeal in its opinion discussed the Supreme Court of California opinion, *Unterthiner v. Desert Hospital District of Palm Springs*, 33 Cal.3d 285, 297 n. 6, 188 Cal.Rptr. 590, 598, n. 6 (1983). Its reading of that case is incorrect as that case involved no issue of the right to counsel nor the impact of the 1979 amendment to the reporting statute.

This Court should grant the writ because this case raises a serious question concerning the impact of a denial of staff privileges on a physician. This case raises issues as important as those which affect high school attendance, welfare benefits, the application of parole, good time credits, and the right to pursue employment with one's good name and reputation intact.

4. The Interests Of The State.

While the state is not a party appearing in this action or any similar action involving physicians, it has expressed its interest, concern, and involvement by its reliance on the integrity of the proceeding in passing § 805 of the Business and Professions Code requiring reporting of staff action. Moreover, if there is any action against a license by the Board of Medical Quality Assurance hearing, the legislature does provide for representation by counsel. See California Business and Professions Code, § 2360, and California Government Code, § 11505.

California has recognized that private hospitals conduct private proceedings which may have a tremendous impact on members and those who propose to be members of hospitals and medical and dental societies. Therefore, the California courts have held that fair procedure and due process do apply at these hearings. A reviewing court is required to look at evidence on the whole record. See *Bixby v. Pierno,* 4 Cal.3d 130, 93 Cal.Rptr. 234 (1971); *Anton v. San Antonio Community Hospital, supra.* However, the California Supreme Court has not decided that a doctor has a right to counsel at a private proceeding. See *Anton v. San Antonio Community Hospital, supra.* While the court determined that such a hearing has incredible consequences for a practitioner, it has not determined that there is a right to retained counsel. It is important to note that Section 805.5 was enacted after *Anton* was decided. Since *Anton,* California courts have not considered the impact § 805 and its amendment, § 805.5, have on a practitioner. As previously noted, § 805 was amended in 1979 to require that a member of a hospital would suffer a report to the Board of Medical Quality Assurance and that a hospital where he enjoyed membership would be *required* to make a determination upon renewal of membership. The *Anton* decision predated the amendment to § 805 so the California Supreme Court has never determined this issue.

The State of California has recognized that this is a significant deprivation of liberties and has provided for counsel at a hearing involving a state hospital. The California courts have not caught up to the changes in the legislation, but there is no significant state interest that would be adversely affected or impacted by a decision to provide counsel. Counsel is already provided at state hearings. It would seem that the state, through its Board of Medical Quality Assurance, would have a great interest in a reliable decision in the private hospital setting.

Section 1094 of the Code of Civil Procedure authorizes a reviewing court to grant relief if it determines that the findings are not supported by substantial evidence in the light of the whole record. However the court may not use the independent judgment test unless reviewing a public hospital action. *Compare* § 1094.5(c) with subsection (d). But see *Unterthiner v. Desert Hospital District of Palm Springs,* 33 Cal.3d 285, 297 n. 6, 188 Cal.Rptr. 590, 598, n. 6 (1983) confining § 1094.5(d) to decisions denying admission as opposed to renewal.

California's comprehensive regulatory scheme does not oppose the presence of a doctor's attorney at such a hearing. Where the proceeding directly affects the license of a physician, it grants such right to doctors against whom the Board of Medical Quality Assurance brings an action to suspend or revoke a license. Ironically, California does not permit a physician the right to an attorney at a hearing which may effectively preclude a physician from practicing medicine. It should be clear that the California courts do not prevent a physician from having retained counsel at a hospital hearing. The California Supreme Court, however, held, prior to the 1979 amendment to the Business and Professions Code, a provision of a hospital bylaw which permitted a hospital judicial review committee, composed entirely of other physicians, the discretion to deny a physician the right to have retained counsel was valid. *Anton v. San Antonio Community Hospital,* 19 Cal.3d 802, 140 Cal.Rptr. 442 (1977).[9] In *Anton,* however,

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[9]Respondent's bylaws are based on the 1974 Uniform Code of Hearing and Appeal Procedures of the California Medical Association and the California Hospital Association. These two powerful trade associations have historically been opposed to any effort to permit a physician applicant to a medical staff to be represented by retained counsel at hospital hearings regarding medical staff privileges.

the court considered this issue in three paragraphs, noting that a request for counsel was not made prior to the hearing, and was made in an equivocal fashion after the first day of hearing. 19 Cal.3d at 827, 140 Cal.Rptr. at 456. The practitioner was represented by counsel of his choice on appeal to the Hospital Board of Trustees and the court held that Dr. Anton, "having failed to make a timely request for counsel before the judicial review committee, may not now be heard to maintain that he should have been permitted to appear with counsel at the hearing". 19 Cal.3d 827, 140 Cal.Rptr. at 457. The court then considered the claimed due process denial in one short paragraph which we quote in its entirety:

> "In any event, we find that the rule here in question — rendering representation by counsel a matter within the discretion of the judicial review committee — is not offensive to the standard of 'minimal due process' which is applicable in proceedings of this kind. (See *Ascherman v. San Francisco Medical Society, supra*, 39 Cal.App.3d 623, 648, 114 Cal.Rptr. 681; *Silver v. Castle Memorial Hospital*, (1972) 53 Haw. 475, 485, 497 P.2d 564." 19 Cal.3d at 827, 140 Cal.Rptr. at 457.

The *Anton* court did not apply the three prong due process test that this Court has used in its recent jurisprudence. See, *e.g., Walters v. National Ass'n. of Radiation Survivors*, ____ U.S. ____, 105 S.Ct. 3180, 3189-90, ____L.Ed.2d ____ (1985). The court of appeal also followed *Anton* and compounded the error. See Slip Opinion pp. 7-8.

The New Jersey Supreme Court, subsequent to *Anton*, has permitted representation by retained counsel at private hospital hearings. *Garrow v. Elizabeth General Hospital and Dispensary, Inc.*, 79 N.J. 549, 401 A.2d 533

(1979). That court recognized the important role that counsel may be called upon to perform:

> "[T]he attorney, in addition to being in a position to advise the client during the hearing, will have the opportunity to present evidence on his behalf, to meet and explain adverse data and to present argument to the board. In view of the physician's substantial interest in proceedings of this nature, on balance, we believe that the physician should have the right to have counsel present at mandated hospital hearings. . . ." 79 N.J. at 566.

5. The Possibility Of An Erroneous Decision.

Neither petitioner here nor the respondent hospital are in a good position to supply the kind of data relating to the possibility of an erroneous decision supplied in either *Walters, supra,* at p. 3193 or *Lassiter, supra.* However "procedural due process rules are shaped by the risk of error inherent in the truth finding process as applied to the generality of cases, not the rare exceptions." However, the *Walters* majority noted that if the nature of the proceeding is adversarial (involving some form of adversary, either lawyer or non-lawyer), and the burden of proof is on the party denied counsel, due process may require counsel. 105 S.Ct. at 3196. The court cited *Parham v. J.R.*, 442 U.S. 584, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979), which involved a non-adversarial civil commitment for a child.

In *Parham* the burden of proof was on the parent and hospital seeking commitment. In addition, there was a statutory procedure requiring an independent review and discharge by the director when he concluded the child was no longer in need of treatment. 442 U.S. at 608-609, 616-617, 99 S.Ct. at 2507, 2511.

In *Goss v. Lopez, supra*, the state's failure to create *any* procedure for a student to challenge a suspension was deemed fatal. Students were entitled to "some kind of notice and afforded some kind of hearing." 419 U.S. at 579, 95 S.Ct. at 738. Implicit in this holding is that the school district shoulder the burden of proof. See 419 U.S. 581, n. 10, 95 S.Ct. at 740 n. 10. Similarly, in *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974), which involved prison disciplinary hearings to suspend good time credits, the court approved of a counsel-less hearing but again this was in a context where the prison was required to prove misconduct. 418 U.S. at 562-565, 945 S.Ct. at 2977-2979.

In the case at bar, the hospital by-laws place the burden of proof on the petitioner to show by a preponderance of the evidence that the hospital decision was arbitrary, unreasonable, or not sustained by the evidence. Article IX, Section 3(k), contained in Appendix C-9.

Thus, the adversarial nature of the proceeding in which a medical representative prosecutes the hospital and medical staff's position, taken together with the allocation of the burden of proof to petitioner, tip the balance and result in a violation of due process.

Counsel is required to assist a practitioner in meeting the burden of proof, objecting to evidence by his adversary, and making legal and factual arguments that the practitioner has satisfied his burden of proof.

In *Walters v. National Ass'n. of Radiation Survivors*, ____ U.S. ____, 105 S.Ct. 3180, 3189-90, ____L.Ed.2d ____ (1985), the court noted "that the constitution permits retention of an attorney" and may on occasion, as in criminal cases require it. ____ U.S. at ____, 105 S.Ct. at 3195. *Walters* simply held that an act of Congress limiting

lawyers' fees in veteran claims cases — a non-adversary proceeding — was not unconstitutional.

B. The Hospital's Use Of Its Own Attorney As The Hearing Officer Violates The Due Process Clause.

1. The Due Process Clause Requires Disqualification Of The Hearing Officer.

On March 21, 1983 Dr. Patwardhan was accorded his appellate review hearing. This procedure is provided by the hospital's by-laws and is a necessary step in the administrative process preliminary to seeking judicial review. Article IX, Section 4. The presiding officer at the hearing was Ms. Suzanne West, who was an associate of the law firm of Musick, Peeler and Garrett, then counsel for the hospital. Ms. West introduced herself as "an attorney and I will be acting as the hearing officer tonight." (Appendix D). Ms. West did not advise petitioner that she was counsel for the hospital. Ms. West did not advise petitioner that her law firm had opposed his Petition for a Writ of Mandate that had resulted in the hearing. Moreover, Ms. West has served as counsel for the hospital throughout these proceedings and through the appeals below. The law firm with which she was then associated has a long history of representing the hospital. See *Anton v. San Antonio Community Hospital*, 19 Cal.3d 802, 807, 140 Cal.Rptr. 442, 444; *Anton v. San Antonio Community Hospital*, 55 Cal.App.3d 212, 127 Cal.Rptr. 394, 395 (1976). Petitioner did not realize that his adversary was also his hearing officer.

Ms. West also demonstrated her bias. When Dr. Patwardhan addressed a question to her, he said "the question I have is, the people who have decided on this first board meeting for my problem concerning the application to San Antonio and made the decision, can they also again

make a decision under exactly similar circumstances?"[10] Selected portions of the transcript appear in Appendix D. Ms. West responded "without making a ruling, I think that is probably a question we will leave on the record for this group to deliberate and determine." At that point, she then moved into the procedure that the committee was going to use for review.

Since Dr. Patwardhan was unrepresented by counsel at the hearing he did not understand the grounds or the procedure for filing a recusal motion for Ms. West or even that he had such rights.

Since the appeal of Dr. Patwardhan's claim involves only a question of law and is based entirely upon the facts appearing in the record, this issue should be heard by this Court. The Court of Appeal found that this issue was a pure question of law, properly raised on appeal, and considered it on the merits. (See Slip Opinion pp. 11-12.)

It is inappropriate for Ms. West to preside as hearing officer[11] while representing the hospital. It is clear that a lawyer/judge cannot serve two masters. Ms. West and her then law firm was an advocate against petitioner and was the "hearing officer" charged with adjudication of his

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[10]Petitioner was likely referring to Article IX, Section 1(e) which provides that membership on the Judicial Review Committee should be limited to "members of the active medical staff who shall not have actively participated in the consideration of the matter involved at any previous level." The hearing officer, Ms. West, also must have had this section in mind when she asked each of the members of the Appeal Panel of the Board of Directors if they had any prior involvement in the matter. See Appendix D.

[11]Article IX, Section 3(c) defines the role of the hearing officer *inter alia,* to include the right "to determine the order or procedure during the hearing. He shall have the authority and discretion, in accordance with these Bylaws, to make all rulings on questions which pertain to matters of law and to the admissibility of evidence."

case. This court has held that "those with substantial pecuniary interests in legal proceedings should not adjudicate these disputes." *Tumey v. Ohio,* 273 U.S. 510, 47 S.Ct. 437, 73 L.Ed. 749 (1927); *Ward v. Village of Monroeville,* 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972). See also *In Re Murchison,* 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955).

It is also clear that this principal applies to administrative adjudicators. *Gibson v. Berryhill,* 411 U.S. 564, 93 St. 1689, 36 L.Ed.2d 488 (1973) (holding that members of Board of Optometry had a pecuniary interest where they had sued appellees.) See also K. Davis, Administrative Law Treatise 2Ed., Vol. 3, § 19.6, p. 392 (1980).

In *Commonwealth Coatings Corp. v. Continental Cas. Co.,* 383 U.S. 145, 89 S.Ct 337, 221 L.Ed. 301 (1968) the Court held that the third arbitrator (selected pursuant to an agreement in which each side appointed one arbitrator who then selected the third) was disqualified because over a period of four to five years he had done $12,000 worth of business with one of the parties. The Court, applying *Tumey,* held "a decision should be set aside where there is *'the slightest pecuniary interest'* on the part of the judge". 383 U.S. at 148, 89 S.Ct. at 339.

The Court pointed out that given the greater power of arbitrators "we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators". *Ibid.* The Court also referred to Canon 33 of the Judicial Canons of Ethics regarding business relationships. *See also,* Cal. Code of Judicial Conduct § 2. See also § 170(5) California Code of Civil Procedure. See also Rule 1606, Cal. Rules of Court.

On April 22, 1986, this Court held that a judge who sat and cast a deciding vote on an undecided issue of law while he maintained two personal actions involving the

same issue violated a party's right to due process. In *Aetna Life Ins. Co. v. LaVoie,* No. 84-1601, ____ U.S. ____, 54 U.S.L.W. 4381 (April 22, 1986), the court held that the constitution required disqualification of a judge with so clear, if even indirect, a pecuniary interest. The Court held that the standard for disqualification, while never capable of precise definition, could be reasonably formulated as a situation " 'which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.' *Ward v. Village of Monroeville,* 54 U.S.L.W. 4384.

The court applied the standard to this case before it and noted "we are not required to decide whether in fact Justice Embry was influenced, but only whether sitting on the case then before the Supreme Court of Alabama 'would offer a possible temptation . . . to the average [judge] . . . [to] lead him not to hold the balance nice, clear and true.' *Ward,* 409 U.S. at 60, 93 S.Ct. at 83. The due process clause 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice.' *In Re Murchison,* 349 U.S. at 136 (citations omitted.)" 54 U.S.L.W. at 4385.

It is clear that Ms. West was selected by the hospital, was paid by the hospital, and that her firm had previously served as counsel for the hospital. The *Aetna* and *Commonwealth Coatings* reasoning applies equally here. In *Commonwealth Coatings,* the fact that the arbitrator had earned $12,000 over four or five years was sufficient to require disqualification. It would seem too obvious that Ms. West and her firm's pecuniary interest in its relationship with respondent must far exceed the amount adjudged in *Commonwealth Coatings* to be sufficient to serve

as the basis for disqualification. And as *Aetna* makes clear, there certainly exists a temptation to the average judge not to hold the balance nice, clear and true.

This is an even more egregious case in that the *lawyer* for the hospital served as hearing officer. The record *demonstrates* bias in that she presided over the proceedings, made rules of procedure and gave other advice to the Appellate Review Committee. The record also shows that when the committee deliberated, Ms. West remained. Appendix D. Again, at the close of the hearing, Ms. West refused to rule on Dr. Patwardhan's request and question concerning whether or not he was getting a biased panel because they had sat before. Colloquy with Petitioner reveals: (Appendix D)

> "Dr. Patwardhan: My feeling up until now was that a person who has presided at one hearing, one person automatically becomes a biased decision maker. I am not a lawyer, but I think that is what the law says.
>
> Ms. West: Do you have any further questions other than the participation in previous applications of some of the Board members?"

Ms. West also ruled on timing and refused to extend Dr. Patwardhan's time. Appendix D.

It is clear from the authorities cited and from the record in this case that Dr. Patwardhan was denied effective appellate review and due process of law.

The temptation for a lawyer who represents a client with a particular interest, to advance that client's interest while serving as hearing officer, is overwhelming. This unfairness was exacerbated when Ms. West was the only person of the adjudicating body with legal experience. The need to satisfy the client hospital is in direct conflict with the need to satisfy justice. In this case respondent

was a long standing client of Ms. West and the law firm she was then associated with represented a large number of hospitals in Southern California. As the only hearing officer, Ms. West was in even a greater position to influence legal decisions that Justice Embry was in *Aetna* where he cast one vote with the majority in a 5-4 decision. Ms. West controlled the hearing, established the procedure, and gave legal advice to the Appellate Review Panel of the Board of Directors.

The Court of Appeal below found no error. The Court also found that "it was the committee members themselves, not Ms. West, who announced their (the Appeal Committee) unanimous decision." (See Slip Opinion, p. 13.) This totally misconstrues the nature of petitioner's argument that Hospital counsel's participation as Hearing Officer was unfair and impermissible. It matters not who actually announced the decision. The hearing officer controlled the hearing and pursuant to the by-laws made significant rulings affecting petitioner's rights.

2. The Hearing Officer Demonstrated Bias In Failing To Act When Petitioner Raised The Issue Of A Biased Panel.

The Court of Appeal held that the issue of Ms. West's actual bias was properly before them. (Slip Opinion, pp. 12-14.) The entire Board of Directors did not sit in review of this case, rather a panel of the Board sat as "Board Appellate Panel", Appendix D. The record makes it clear that three members of the Appellate Review Panel had presided on Dr. Patwardhan's earlier appeal. The record reveals that the members of the Appellate Review panel are Mr. Dwight Bright, Mr. Rene Biani, Mr. Hershel Glen, Mr. Robert Sherwood and Mr. Gordon Swisler. In response to a question asked by Ms. West, three of the members, Mr. Swisler, Mr. Sherwood and Mr. Biani responded that they were members of the Appellate

Board in 1980. Appendix D. Dr. Patwardhan immediately raised the question that this hearing was quite similar to the hearing in 1980 and he stated as follows:

> By Dr. Patwardhan:
>
> "So the question that I have is: The people who have decided on the first board meeting for any problem concerning the Application to San Antonio Hospital and made the decision, can they also again make the decision under exactly similar circumstances?" Appendix D.

When Dr. Patwardhan raised this issue at the appellate review level, Ms. West did not rule on Dr. Patwardhan's request, which must be deemed as a request for a new committee. She merely stated:

> By Ms. West:
>
> "I think that is probably a question that we will leave on the record for this group to deliberate and determine." Appendix D.

The group never deliberated and determined this question and Dr. Patwardhan raised it again at the end of the hearing:

> Dr. Patwardhan:
>
> "My feeling up until now was that a person who had presided in one hearing one person automatically becomes a biased decision maker. I am not a lawyer, but I think that is what the law says."

Appendix D. Ms. West again did not rule on Dr. Patwardhan's application. She merely said, "Do you have any further questions other than the participation and previous applications of some of the board members?" Appendix D.

Dr. Patwardhan was denied effective appellate review. This court should so rule and reverse the judgment of the Court of Appeal. In *Myers v. Affiliated Property Craftsmen*, 667 F.2d 817, 821 (9th Cir. 1982), the court reversed because one member of the hearing committee had been told that the "defendant" had admitted his guilt. *Accord, Wilson v. San Francisco Munic. Ry.*, 29 Cal.App.3d 870, 105 Cal.Rptr. 855 (1973); *Falcone v. Dantinne*, 420 F.2d 1157, 1161-63 (3rd Cir. 1969).

The Court of Appeal found no California authority and instead relied on *Leonard v. Board of Directors, Powers County Hospital Dist.*, 673 P.2d 1019 (Co. 1983) from the Colorado Court of Appeals, which held that the policy favoring unbiased tribunals must yield to necessity. The Court of Appeal accepted the hospital's statement that the Board could not meet without the challenged members. The Court of Appeal, in adopting a rule of necessity, missed the point; since the "panel" did not consist of the whole Board of Directors, other members, who were unbiased, could have sat on the case. See generally, *Aetna Life Ins. Co. v. LaVoie*, No. 84-1601, ____ U.S. ____, 54 U.S.L.W. 4381 (April 22, 1986).

IV.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the California Court of Appeal.

Respectfully submitted,

Dated: May 14, 1986

LAWRENCE SILVER
A Law Corporation

By: _____
LAWRENCE SILVER AND
LOUIS M. NATALI, JR.,
Attorneys for Petitioner
Vinod C. Patwardhan, M.D.

APPENDIX A

NOT FOR PUBLICATION

No. E001443
(Super.Ct.No. PCV-32929)

OPINION

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA

VINOD C. PATWARDHAN,
Plaintiff and Appellant,

vs.

SAN ANTONIO COMMUNITY HOSPITAL,
a Non-Profit Corporation,
Defendant and Respondent,

BOARD OF TRUSTEES OF SAN ANTONIO
COMMUNITY HOSPITAL,
Real Party in Interest.
[Filed October 22, 1985]

APPEAL from the Superior Court of San Bernardino County. Fenton Jones, Judge.* Affirmed.

Lawrence Silver and Louis M. Natali, Jr. for Plaintiff and Appellant.

Musick, Peeler & Garrett, Jay D. Christensen and Suzanne F. West, for Defendant and Respondent.

No appearance for Real Party in Interest.

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*Retired judge of the municipal court sitting under assignment by the Chairperson of the Judicial Council.

The court below denied a petition for writ of mandate challenging respondent hospital's third rejection of plaintiff's application for hospital privileges.

On appeal, plaintiff, Dr. Vinod C. Patwardhan, contends that: (1) denial of counsel at the hospital hearings violated his rights to procedural due process; (2) the composition of the appellate review committee precluded effective appellate review; and (3) his rights under the First and Fourteenth Amendments were invaded when the hospital noted his conduct in a hunger strike. For the reasons hereafter stated, we disagree.

FACTS

Dr. Patwardhan's involvement with San Antonio Community Hospital ("Hospital") is extended and complex. Dr. Patwardhan first applied for staff privileges at the Hospital in 1976. The Hospital denied the application and Dr. Patwardhan did not appeal. In 1979, Dr. Patwardhan reapplied, and the Hospital again rejected his application. Dr. Patwardhan appealed this rejection to the Hospital's Judicial Review Committee (JRC). The JRC conducted a hearing, and in November of 1979, it upheld the decision to deny privileges. Dr. Patwardhan appealed the JRC's decision to the Hospital's Board of Trustees. Prior to the Board's meeting, Dr. Patwardhan indicated by letter that he would not attend. He indicated that he would protest the Hospital's procedures with a "fast unto death."

On the day of the trustees' meeting, Dr. Patwardhan pinned signs to his coat lapels and sat in the Hospital's library. He remained there and in the adjacent hallways throughout the day. Near 7 p.m., an administrator asked Dr. Patwardhan to leave, and he refused. A panel of trustees met in a nearby room and conducted an appellate review in his absence. Near 9 p.m. hospital personnel again requested Dr. Patwardhan to leave. This time, the

administration informed him that he was trespassing, and then called the local police. Dr. Patwardhan left without further incident, but continued his fast that night and for several days thereafter. For nearly a week he regularly stood near the Hospital's main entrance. In February 1980, the trustees reported their decision to uphold the denial of privileges.

Dr. Patwardhan submitted his third application in February 1981. Because the Hospital initially refused to process this application, Dr. Patwardhan petitioned the superior court for a writ of mandate. The superior court granted a writ to compel the Hospital to process the application in accordance with its bylaws. In August and September 1981, the Hospital held meetings of its Credentials and Executive Committees, both of which voted to reject the application.

Dr. Patwardhan appealed this decision to the JRC. Before the JRC's first meeting, Dr. Patwardhan asked to be represented by retained counsel at the JRC hearings. Hospital bylaws vested the JRC with discretion to permit counsel. The JRC denied the request, and advised Dr. Patwardhan of his right under the bylaws to be represented by another physician.

The JRC conducted hearings on five evenings, beginning in November 1982, and concluding in February 1983. At the hearings, a member of the executive committee presented evidence in support of its four reasons for denying Dr. Patwardhan's application. These "charges" and the evidence supporting them may be summarized as follows.

The first charge was that Dr. Patwardhan had misrepresented his background to the Hospital. The JRC determined that in his first application Dr. Patwardhan had misrepresented that he was on the faculty of the Depart-

ment of Medicine at Loma Linda University. He had also represented to the Hospital that he had been offered a staff position at a New York medical center when in fact that institution had denied his request for a continued association. Also, he informed the JRC that the Board of Medical Quality Assurance ("BMQA") had concluded an investigation of him, when in fact he later admitted he had been told one month before that BMQA would be filing charges against him.

The second charge was of misrepresentation by Dr. Patwardhan to the public and to other hospitals. The JRC found evidence of his use of fictitious credentials in connection with speaking engagements and in applications to local hospitals.

For the third charge, the JRC found substantial evidence to support the conclusion that Dr. Patwardhan's professional and personal judgment was sufficiently poor to deny him staff privileges. There was clear evidence that in order to coerce a licensed vocational nurse to perform a procedure for which she was not legally authorized, Dr. Patwardhan had instructed the husband (a layman) of a critically ill patient to administer intravenous chemotherapy. There also was evidence (which Dr. Patwardhan admitted) that he permitted an unlicensed nonprofessional employee to administer intravenous chemotherapy in his medical office.

The JRC also noted that Dr. Patwardhan began his hunger strike on the hospital premises. The JRC specifically stated that it did not philosophically oppose Dr. Patwardhan's right to protest, but only considered his choice of location as a serious error in judgment.

Finally, the JRC was satisfied that the evidence called into serious question Dr. Patwardhan's medical skills and quality of case management. The Committee reviewed

letters, memoranda and proctor reports all detailing dissatisfaction with Dr. Patwardhan's judgment. The JRC also reviewed the evidence of the quality of care given to five specific patients in two nearby hospitals.

Dr. Patwardhan was present at each of the JRC meetings reviewing the evidence. The record demonstrates that where appropriate, the JRC heard and considered Dr. Patwardhan's objections of hearsay, staleness, and lack of probity or relevance. At the third hearing, Dr. Patwardhan called three physicians who testified favorably as to Dr. Patwardhan's credibility, character, and medical skills. At various steps, Dr. Patwardhan testified in his own behalf, and at the final JRC hearing, he presented argument discounting the truth or reliability of significant items of evidence.

The record is also clear that from a legal and tactical standpoint, Dr. Patwardhan's presentation to the JRC left much to be desired. Frequently, Dr. Patwardhan responded to questions with long, rambling statements. Typically, these statements involved a mixture of direct examination, cross-examination, direct testimony, and argument. In several instances, he failed to follow or lead the JRC quickly to appropriate sections of a document.

None of his witnesses appeared to have been informed of the specific charges against him. As a result, these witnesses could only offer opinions of good character and reputation. Dr. Patwardhan also made tactical mistakes in that he admitted the truth of coercing the LVN regarding the IV treatment, and of permitting the unlicensed administration of IV treatments at his office. He also stated that his decision to conduct his hunger strike as he did was "a mistake."

Dr. Patwardhan further disserved his own case by making personal and professional attacks on the members

of the JRC. Patwardhan often accused the JRC and the hospital of bias against him. He asserted that one panel member, Dr. Kolber, had a financial interest in rejecting Dr. Patwardhan's petition, and that the chair of the JRC, Dr. McPherson, was not well liked by other physicians. Dr. Patwardhan also likened the JRC to procedures under Khomeini.

On February 15, 1983, the JRC reported its decision to uphold Dr. Patwardhan's rejection.

Dr. Patwardhan sought and received review by the Hospital Board of Trustees. Dr. Patwardhan did not avail himself of the Hospital's permission to be represented by counsel at this appellate hearing. The Board met on March 21, 1983. The hearing officer for the review panel was Ms. Suzanne West, a member of a law firm which has previously represented the Hospital in legal proceedings. At the hearing's outset, three of the five board members, Mr. Zwissler, Mr. Sherwood and Mr. Biane, stated that they recalled Dr. Patwardhan from his apellate [sic] hearing of 1980. However, each stated they had no present bias against him. When Dr. Patwardhan questioned the propriety of their deciding the present matter, Ms. West made no affirmative ruling. Rather, she determined that the issue of bias would be reserved for the future deliberations of the panel. On March 25, 1983, the Board reported its affirmance of the JRC's decision. It concluded that the JRC had provided Dr. Patwardhan a fair hearing and had decided on the basis of proper evidence.

In March of 1984, Dr. Patwardhan again petitioned the superior court for a writ of mandate ordering the Hospital's compliance with its bylaws. The court denied this in August 1984. It is from the denial of the writ that Dr. Patwardhan has appealed.

DISCUSSION

I. The Right to Counsel

Dr. Patwardhan argues that as a medical doctor seeking staff privileges at a hospital California law afforded him the right to representation by retained counsel. Alternatively, he argues that his particular difficulties in communication entitled him to representation. Neither position is supported by California law or the facts of this case.

In *Anton v. San Antonio Community Hospital* (1977) 19 Cal.3d 802, the Supreme Court explicitly considered the question of whether there is a right to the assistance of counsel at hospital peer review hearings. That case involved the disciplinary suspension of privileges of a staff physician. The court stated that "a physician may neither be refused admission to, nor expelled from the staff of a hospital, *whether public or private*, in the absence of a procedure comporting with the minimum common law requirements of procedural due process . . . ." (*Id.*, at p. 815.)

The court evaluated the several specific procedural formalities required of such hearings. It stated that "rendering representation by counsel a matter within the discretion of the judicial review committee — is not offensive to the standard of 'minimal due process' which is applicable in proceedings of this kind [citations]." (*Id.*, at p. 827.)

In so concluding, the court was guided by its holding in *Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541. In that case, the court determined that because of their important public role, even private medical associations were required to provide applicants a fair procedure. Specifically, the court held that "[t]he common law requirement of a fair procedure does not compel

formal proceedings with all the embellishments of a court trial." (*Id.*, at p. 555; see *Ascherman v. Saint Francis Memorial Hospital* (1975) 45 Cal.App.3d 507, 511. But see *Garrow v. Elizabeth General Hospital and Dispensary, Inc.* (1979) 79 N.J. 549 [401 A.2d 533].)

The *Anton* case therefore answers plaintiff's contention. As in *Anton*, permission for representation by counsel vested in the Judicial Review Committee. The *Pinsker* case established that the minimum requirements of a fair procedure were adequate notice of the charges and a reasonable opportunity to respond. (*Pinsker, supra*, 12 Cal.3d 541, 555-556.) There is no question that the Hospital afforded Dr. Patwardhan these rights. The Hospital therefore had a legal right to deny representation by counsel.

A close reading of *Anton* and subsequent cases demonstrates that their principles still control the resolution of this question despite the Legislature's subsequent adoption of public reporting procedures. Sections 805 and 805.5 of the Business and Professions Code were enacted too late to be applicable to *Anton*. Following the 1979 amendments to the 1976 act, the code requires that a hospital report any reduction or denial of hospital privileges to the state's Board of Medical Quality Assurance ("BMQA"). Section 805.5 orders that before any hospital renews privileges, it must conduct an investigation of the applicant with the BMQA. Reapplications are generally made on a biannual basis. Thus Dr. Patwardhan argues the effect of this statutory scheme is to broadcast questions of his professional reputation while preventing him the opportunity to protect himself through counsel.

This argument is unpersuasive. The absence of a right to counsel in physician's professional competency hearings has been recognized subsequent to the passage of the 1979 amendments to the 1976 act. (*Cipriotti v. Board of*

Directors (1983) 147 Cal.App.3d 144.) In reversing the summary suspension of a physician's hospital privileges, the court in *Cipriotti* recognized the importance of vested hospital rights. However, the court also recognized that "license suspension, revocation, or other similar disciplinary proceedings are not for the purpose of punishment but primarily to protect the public served by the licensee employed by the hospital." (*Id.,* at p. 157.) The paramount concern for the hospital is the question of the quality of medical care. (*Id.*) Even in light of the high stakes involved, the court concluded that the court's obligation extended no further than to ensure a fair hearing. So long as a fair hospital hearing is provided, "[t]he hospital should not be hampered by formalities not required by its bylaws nor by due process considerations." *(Id.)*

A subsequent case, *Haller v. Burbank Community Hospital Foundation* (1983) 149 Cal.App.3d 650, recognized the potential for a BMQA report to cause harm to the physician. (*Id.,* at p. 659.) It is instructive to note the remedy imposed in that case. There, the hospital was ordered to withdraw its improperly filed BMQA report, and hold a hearing on medical competence in accordance with its bylaws. (*Id.,* at p. 660.) In the case *sub judice* the physician has already been accorded this right.

In addition, the Supreme Court demonstrated the continuing viability of *Anton* in *Unterthiner v. Desert Hospital Dist.* (1983) 33 Cal.3d 285. There, in reviewing a physician's application for hospital staff privileges, the court affirmed the key distinction found in *Anton* between the rights of a physician already admitted to staff membership, which were vested, and those not yet admitted, which were not. (*Id.,* at p. 297, citing *Anton, supra,* 19 Cal.3d at p. 824.) *Unterthiner* was decided after the BMQA reporting statutes. The hospital there followed

procedural standards sanctioned by *Anton.* These procedures presented no cognizable defect. The Supreme Court accordingly deferred to the hospital's findings. (Id., at p. 300.)

Dr. Patwardhan's second argument is that his particular presentation demonstrates his need for counsel. The Hospital was under no duty to grant him this request. The record demonstrates that Dr. Patwardhan is highly fluent in English, and that he commands both formal and colloquial vocabularies. We are cited to no instance in which Dr. Patwardhan was unable to express his ideas adequately. Although counsel might have restrained his unfortunate personal remarks and have focused his arguments, Dr. Patwardhan was not entitled to this benefit as a matter of right. We note that the bylaws parallel those considered adequate in *Anton* and provide for representation by another physician. Dr. Patwardhan knew of this right but was not so represented. The courts have recognized the legitimate reasons for denying counsel, such as the disinclination to increase the adversarial nature of fact-finding hearings and the potential dimunition of expertise retained counsel might inject. (See generally *Pinsker, supra,* 12 Cal.3d at pp. 554-556; accord *Cipriotti, supra,* 147 Cal.App.3d 144, 157.)

In this context the Supreme Court has stated that "the courts remain available to afford relief [from a hospital's unfair hearing procedures] in the event of the abuse of such discretion." (*Pinsker, supra,* 12 Cal.3d 541, 556.) The standard is that "the matter will be returned to the administrative body for redetermination in all cases in which there is a 'real doubt' as to whether the same action would have been taken upon a proper assessment of the evidence. [Citations.]" (*Miller* v. *Eisenhower Medical Center* (1980) 27 Cal.3d 614, 635.) Counsel for Dr. Patwardhan has not come forward with a single new argu-

ment which Dr. Patwardhan himself did not make, however inartfully, nor does counsel attack the sufficiency of the evidence underlying the JRC's determination. Hence, we entertain no real doubt as to the conclusion of yet another JRC hearing. There was no right to counsel in the present case, and it was not an abuse of discretion to deny it.

II. Effective Appellate Review

Dr. Patwardhan further contends that the composition of the Committee of the Board of Trustees precluded effective review. This argument must first pass the threshold hurdle that this argument was not presented to the trial court.

It is well settled that "issues not raised in the trial court cannot be raised for the first on appeal." (*Estate of Wasterman* (1968) 68 Cal.2d 267, 279. The exception to this rule is that a party may "raise belatedly 'a pure question of law which is presented on undisputed facts.' " (*Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 417.) We therefore may consider whether the undisputed facts constitute impermissible bias as a matter of law.

A. The Hearing Officer

California courts have not yet addressed the necessary limitations on a hearing officer in a medical peer review committee. A similar question was addressed where the hearing officer of an appellate panel of the Workers' Compensation Appeals Board was allegedly acting concurrently as advisory counsel. (*Rowen v. Workers' Comp. Appeals Bd.*, 119 Cal.App.3d 633.) There, the court reasoned " 'in general, the fact that an administrative agency is both accuser and judge is not considered to deprive the accused of due process of law. [Citation.] We see no

reason why, this being so, the same trained personnel cannot legally advise and assist the agency in both functions if such assistance does not violate any statutory provisions and if the agency itself makes the decision.' [Citation.]" (*Id.*, at pp. 640-641.)

On the record before us it appears that the choice of Ms. West as hearing officer while concurrently representing the Hospital was not improper as a matter of law. Neither condition suggested by *Rowen, supra*, applies. There is no allegation of a statutory prohibition of such conduct. (See *Midstate Theatres, Inc. v. County of Stanislaus* (1976) 55 Cal.App.3d 864.) The Hospital's bylaws limited the decision to the Board. Further it was the committee members themselves, not Ms. West, who announced their unanimous decision.

Our conclusion is in accord with cases specifically addressing medical staff review procedures. In *Applebaum v. Board of Directors of Barton Memorial Hospital* (1980) 104 Cal.App.3d 648, 659, the court stressed the need for a separation between the physicians bringing charges to the hospital's attention and those who ruled on the charges validity. In a subsequent case, *Anton v. San Antonio Community Hospital*, 132 Cal.App.3d 638, 648, ("Anton II") the court stressed that this separation principle was narrow. It stated "[w]hat *Applebaum* held is that the same member of the medical staff may not first sit on the investigating committee and then sit as a member of the hearing or review committee." Hence, under *Anton* II and *Applebaum*, it was not improper for retained counsel to preside as hearing officer.

B. The Board Panel

The question of composition of hospital appellate panels is also unanswered in California case law. The record establishes that three members of the review panel

had heard Dr. Patwardhan's previous appeal. The record also establishes that, under its bylaws, the Board of Trustees was the only body with power to hear Dr. Patwardhan's appeal from the JRC.

Lacking California authority on this point, we take note of the reasoning advanced by the Colorado Court of Appeals in *Leonard v. Board of Directors, Powers County Hospital District* (1983) 673 P.2d 1019. In that case, Dr. Leonard's previous conduct before the board had potentially biased its members against him. (*Id.*, at p. 1021.) Against a contention that the board must therefore be disqualified, the court found that "the policy favoring an unprejudiced tribunal must yield, . . . to allow action by the only body empowered to act in the matter." (*Id.*, at p. 1022, citations omitted.) The court recognized that to hold otherwise, absent an allegation of egregious violation of fundamental rights, would intolerably frustrate the lawful authority of the agency in question. (*Id.*, at p. 1023.)

Similarly, we see no reason to deny the authority of the Board of Trustees in this case. The appellate panel of the Board heard Dr. Patwardhan's objection, but in its ruling, explicitly rejected the contention of improper bias. In resolving this question, we are guided by the standard articulated in *Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, 790.) There, the court stated that "[t]he right to an impartial trier of fact is not synonymous with the claimed right to a trier completely indifferent to the general subject matter before him."

That three members of the Board were previously aware of Dr. Patwardhan does not demonstrate bias, but only an absence of complete indifference. Each member stated that they bore no prejudice against him. Hence their participation did not, as matter of law, deny Dr. Patwardhan an effective appellate review.

III. Free Speech Rights

Finally, Dr. Patwardhan argues that the JRC infringed on rights protected by the First and Fourteenth Amendments when it found that he had made a serious error in judgment in conducting a hunger strike. This argument too, comes before us for the first time on appeal. Nevertheless, we deem it a pure question of law based on undisputed facts, and rule accordingly. (See *Sea & Sage Audubon Society, Inc. v. Planning Com., supra*, 39 Cal.3d 412, 417.)[1]

The uncontested facts are that Dr. Patwardhan chose to conduct a hunger strike in lieu of appearing at the Board of Trustees' appellate review hearing scheduled to consider his second application. He denied requests by administrators for him to leave, and left only after a telephone call to his attorney confirmed that he was trespassing. In a subsequent interview, Dr. Patwardhan conceded that the hunger strike was not in good judgment.

It is well settled that the First Amendment protects the "expression of ideas" through speech as well as conduct. (*Spence v. Washington* (1974) 418 U.S. 405 [41 L.Ed.2d 842, 94 S.Ct. 2727].) However, First Amendment rights are not absolute. (*Konigsberg v. State Bar of California* (1961) 366 U.S. 36 [6 L.Ed.2d 105, 81 S.Ct. 997].) Thus, the exercise of First Amendment rights may be regulated. As one member of the Supreme Court wrote "[N]o mandate in our Constitution leaves States and governmental units powerless to protect the public from . . . conduct that disturbs the tranquility [of homes and of] public and other buildings that require peace and quiet to

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[1]This court has already ruled on a motion in this appeal in order to generate a more adequate record. The record as it stands already presents more than enough facts to prejudice this claim.

carry out their functions, such as courts, libraries, schools, and hospitals." (*Gregory v. Chicago* (1969) 394 U.S. 111, 118 [22 L.Ed.2d 134, 140, 89 S.Ct. 946] (conc. opn. of Black, J.).) It has therefore been held that trespass on another's private property, even in the context of a labor dispute, is not a protected activity. (*Annenberg v. Southern Cal. Dist. Council of Laborers* (1974) 38 Cal.App.3d 637, 641; accord, *Pittsburg United School Dist. v. California School Employees Assn.* (1985) 166 Cal.App.3d 875.)

Dr. Patwardhan, therefore, had no right to protest within the hospital. In deference to his legitimate rights of free speech, the JRC's ruling clearly stated that it had no objection to Dr. Patwardhan's philosophic right to protest. The JRC did not violate a constitutional freedom when it took note of the judgment Dr. Patwardhan displayed in engaging in unprotected conduct.

DISPOSITION

The judgment is affirmed.

NOT FOR PUBLICATION.

MORRIS

P.J.

We concur:

MC DANIEL

J.

RICKLES

J.

APPENDIX B

California Business and Professions Code § 805

The chief executive officer and the chief of the medical staff, where one exists, of any health facility licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code, or any health care service plan or medical care foundation shall report to the agency which issued the license, certificate or similar authority when any licensed physician and surgeon, clinical psychologist, podiatrist, or dentist is denied staff privileges, removed from the medical staff of such institution or if his staff privileges are restricted for a cumulative total of 45 days in any calendar year for any medical disciplinary cause or reason. Such reports shall be made within 20 working days following such removal or restriction, shall be certified as true and correct by the chief executive officer and the chief of the medical staff, where one exists, and shall contain a statement detailing the nature of the action, its date and all of the reasons for, and circumstances surrounding, such action. If the removal or restriction is by resignation or other voluntary action that was requested or bargained for in lieu of medical disciplinary action, the report shall so state.

The reporting required herein shall not act as a waiver of confidentiality of medical records and committee reports. The information reported or disclosed shall be kept confidential except as provided in subdivision (c) of Section 800, provided that a copy of the report containing the information required by this section may be disclosed as required by Section 805.5 with respect to reports received on or after January 1, 1976. The Board of Medical Quality Assurance, the Board of Osteopathic Examiners, and the Board of Dental Examiners shall disclose such reports as required by Section 805.5. A file

containing reports received pursuant to this section shall be maintained by the agency receiving the reports for a minimum of five years after receipt.

Failure to make a report pursuant to this section shall be a misdemeanor punishable by a fine of not less than two hundred dollars ($200) nor more than one thousand two hundred dollars ($1,200).

California Business and Professions Code § 805.5

(a) Prior to granting or renewing staff privileges for any physician and surgeon, clinical psychologist, podiatrist, or dentist, any health facility licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code, or any health care service plan or medical care foundation, or the medical staff of any such institution, shall request a report from The Board of Medical Quality Assurance, the Board of Osteopathic Examiners, or the Board of Dental Examiners to determine if any report has been made pursuant to Section 805 indicating that the applying physician and surgeon, clinical psychologist, podiatrist, or dentist has been denied staff privileges, been removed from a medical staff, or had his staff privileges restricted as provided in Section 805. The request shall include the name and California license number of the physician and surgeon, clinical psychologist, podiatrist, or dentist. Furnishing of a copy of the 805 report shall not cause the 805 report to be a public record.

(b) Upon a request made by an institution described in subdivision (a) or its medical staff, which is received on or after January 1, 1980, the board shall furnish a copy of any report made pursuant to Section 805. However, the board shall not send a copy of a report where the denial, removal, or restriction was imposed solely because of the failure to complete medical records.

In the event that the board fails to advise such institution within 30 working days following its request for a report required by this section, the institution may grant or renew staff privileges for the physician and surgeon, clinical psychologist, podiatrist, or dentist.

(c) Any institution described in subdivision (a) or its medical staff which violates the provisions of subdivision (a) is guilty of a misdemeanor and shall be punished by a fine of not less than two hundred dollars ($200) nor more than one thousand two hundred dollars ($1,200).

APPENDIX C

SAN ANTONIO COMMUNITY HOSPITAL BY-LAWS

ARTICLE IX

HEARING AND APPEAL PROCEDURE

SECTION 1. *Judicial Review of Unsuccessful Applicants*

a. Request for Review

Provided the unsuccessful applicant who is subject to such interview procedure has not waived his rights under this Article by failing to request an interview with the Credentials Committee, as is required by Article V, Section 4, paragraph g, an unsuccessful applicant may make a written demand for review to the Administrator of the hospital within thirty (30) days after notice to the applicant of his nonappointment. Such demand must contain a specific factual statement alleging that (1) the applicant was denied admission, in violation of Article III, Section 4; or (2) the denial of applicant's staff membership was the result of bias, prejudice, or other improper conduct on the part of a departmental committee, the Credentials Committee, the Executive Committee, or the Board of Trustees; or (3) the applicant's application, without good cause, was not considered and evaluated under the criteria set forth in Article III, Section 3 or Article V, Section 4, paragraphs d(3); or (4) the denial of the application on the basis that the applicant did not meet the minimum qualifications set forth in Article V, Section 4, paragraph d was unreasonable, arbitrary, or capricious.

b. Procedure for Processing Demand for Review of Unsuccessful Applicants

In the event such a demand is made, the unsuccessful applicant shall be entitled to an informal meeting with the

Administrator and the President of the Medical Staff, at a time convenient to each, but in any event, within sixty (60) days, for the sole purpose of discussing whether the written Claim sets forth a specific factual basis for the claim. If either the Administrator or the President of the Staff conclude, at such meeting, or within ten (10) days thereafter, that the demand is specific and factual, then a judicial review committee shall be convened to hear the matter as is provided in Article IX hereof. In all other cases, the applicant shall be notified by the Administrator that his demand has been found insufficient, and no further proceedings shall be held.

SECTION 2. *Request for Hearing*

a. Notice of Recommendation

In all cases in which the Executive Committee has taken any of the actions constituting grounds for hearings as set forth in Subsection b, Section 1 (Grounds for Hearing), the applicant or Medical Staff member, as the case may be, Shall promptly be given notice. Such applicant or member shall have fifteen (15) days following the date of the receipt of such notice within which to request a hearing by the Judicial Review Committee hereinafter referred to. Said request shall be by notice to the Administrator. In the event the applicant or member does not request a hearing within the time and in the manner previously set forth, he shall be deemed to have accepted the recommended action and it shall thereupon become effective immediately.

b. Grounds for Hearing

Any one or more of the following actions shall constitute grounds for a hearing:

(1) denial of Medical Staff membership, subject to the limitations set forth in this Article, Section 1 above;

(2) denial of requested advancement in Medical Staff membership;

(3) denial of Medical Staff reappointment;

(4) demotion to lower Staff category;

(5) suspension of Medical Staff membership;

(6) expulsion from Medical Staff membership;

(7) denial of requested privileges subject to the limitations set forth in this Article, Section 1 above;

(8) reduction of privileges;

(9) suspension of privileges; and

(10) termination of privileges.

c. Time and Place for Hearing

Upon receipt of a request for hearing, the Administrator shall deliver such request to the Executive Committee. The Executive Committee shall within fifteen (15) days after receipt of such request, schedule and arrange for a hearing. The Executive Committee shall give notice to the applicant or member of the time, place, and date of the hearing. The date of the commencement of the hearing shall be not less than thirty (30) days, nor more than forty-five (45) days from the date of receipt of the request by the administrator for a hearing; provided, however, that when the request is received from a member who is under suspension which is then in effect, the hearing shall be held as soon as the arrangements may be reasonably made, but not to exceed fifteen (15) days from the date of receipt of the request for hearing by the Administrator.

d. Notice of Charges

As part of, or together with the notice of hearing, the Executive Committee shall state in writing, the acts or omissions with which the Medical Staff member is charged, a list of charges by chart number under question, or the reasons for the denial of the request of the applicant or Medical Staff member. If either party, by notice, requests a list of witnesses, then each party within ten (10) days of such request shall furnish to the other a list, in writing, of the names and addresses of the individuals, if known, who will give testimony or evidence in support of that party at the hearing.

e. Judicial Review Committee

When a hearing is requested, the Executive Committee shall appoint a Judicial Review Committee which shall be composed of not less than five (5) members of the Active Medical Staff who shall not have actively participated in the consideration of the matter involved at any previous level. Such appointment shall include designation of a chairman. Knowledge of the matter involved shall not preclude a member of the Active Medical Staff from serving as a member of the Judicial Review Committee. In the event that it is not possible to appoint a fully qualified Judicial Review Committee from the Active Medical Staff, the Executive Committee may appoint qualified physicians from the Consulting Staff or from the physicians outside of the Staff.

f. Failure to Appear

Failure without good cause of the person requesting the hearing to appear and proceed at such a hearing, shall be deemed to constitute voluntary accdeptance of the recommendations or actions involved which shall become final and effective immediately.

g. Postponement and Extensions

Postponements and extensions of time beyond the times expressly permitted in these Bylaws may be requested by anyone but shall be permitted by the Judicial Review Committee only on a showing of good cause.

h. Decision of the Judicial Review Committee

Within five (5) days after final adjournment of the hearing, the Judicial Review Committee shall render a decision which shall be accompanied by a report in writing which shall be delivered to the body whose decision prompted the hearing. In all events, a copy of said decision shall be forwarded to the Board of Trustees. The report shall contain a concise statement of the reasons justifying the decision made. At the same time, a copy of the report and decision shall be delivered by certified mail, return receipt requested, to the person who requested the hearing.

i. The Appeal

The decision of the Judicial Review Committee shall be considered final, subject only to the right of appeal as provided in Section 3 of this Article.

SECTION 3. *Hearing Procedure*

a. Personal Presence Mandatory

Under no circumstances shall the hearing be conducted without the personal presence of the person requesting the hearing.

b. Presentation

The hearings provided for in these Bylaws are for the purpose of interprofessional resolution of matters bearing on conduct or professional competency. Accordingly, neither the person requesting the hearing, the Executive

Committee, nor the Board of Trustees shall be represented in any phase of the hearing by an attorney at law unless the Judicial Review Committee, in its discretion, permits both sides to be represented by legal counsel. The person requesting the hearing shall be entitled to be accompanied by and represented at the hearing only by a physician licensed to practice in the State of California who, preferably, is a member in good standing of the Medical Staff. The body whose decision prompted the hearing shall appoint two (2) representatives from the Medical Staff; namely, a member of the Executive Committee and a member of the Credentials Committee, to present its recommendation in support thereof and to examine the witnesses.

c. The Presiding Officer

The presiding officer at the hearing shall be the hearing officer or, if none has been appointed, the chairman of the Judicial Review Committee. The presiding officer shall act to ensure that all participants in the hearing have a reasonable opportunity to be heard, that all competent and available oral and documentary evidence is presented and that decorum is maintained. He shall be entitled to determine the order or procedure during the hearing. He shall have the authority and discretion, in accordance with these Bylaws, to make all rulings on questions which pertain to matters of law and to the admissibility of evidence.

d. The Hearing Officer

At the request of the person who requested the hearing, the Executive Committee, the Judicial Review Committee or on its own request, the Board of Trustees may appoint a hearing officer who may be an attorney at law to preside at the hearing. If requested by the Judicial Review Committee, he may participate in the deliberation of such

body and be a legal advisor to it. He shall not be entitled to vote.

e. Record of Hearing

The Judicial Review Committee shall maintain a record of the hearing made by a certified shorthand reporter present to make a record of the hearing. The cost of such shorthand reporter shall be borne by the party requesting same. The Judicial Review Committee may, but shall not be required to, order that oral evidence shall be taken only on oath or affirmation administered by any person designated by such body and entitled to notarize documents in the State of California.

f. Rights of Both Sides

At a hearing, both sides shall have the following rights: to call and examine witnesses, to introduce exhibits or documentary evidence, to cross-examine any witness on any matter relevant to the issues, to impeach any witness and to rebut any evidence. If the applicant or member of the Medical Staff does not testify on his own behalf, he may be called and examined as if under cross-examination.

g. Admissibility of Evidence

The hearing need not be conducted according to rules of law relating to the examination of witnesses or presentation of evidence. Any relevant evidence shall be admitted by the presiding officer if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the admissibility of such evidence in a court of law. Each party shall have this right to submit a memorandum of points and authorities, and the Judicial Review Committee may request such a memorandum to be filed following the closing of the

hearing. The Judicial Review Committee may interrogate the witnesses or call additional witnesses if it deems it appropriate.

h. Official Notice

The presiding officer shall have the discretion to take official notice of any matters either technical or scientific, relating to the issues under consideration which pertain to the practice or medicine and/or which could have been judicially noticed by the courts of this State. Reasonable or additional time shall be granted, if requested, to present written rebuttal of any evidence admitted on official notice.

i. Scope of Review — Applicants

In cases involving an adverse decision on an application for Medical Staff membership, the Judicial Review Committee may only consider those claims which pertain to the applicant's qualifications and may not consider claims pertaining to the validity of the criteria against which the applicant was evaluated or the validity of the determination of need identified pursuant to the provisions in Article V, Section 3 of these Bylaws.

j. Basis of Decision

The decision of the Judicial Review Committee shall be based on the evidence produced at the hearing. This evidence may consist of the following:

1) oral testimony of witnesses:

2) any material contained in the Medical Staff's personnel files regarding the person who requested the hearing;

3) any and all applications, references, and accompanying documents;

4) all officially noticed matters;

5) any other admissible evidence.

k. Burden of Proof

At any hearing involving any of the grounds for hearing specified in Section 1 (Request for Hearing), Subsection b (Grounds for Hearing), 1) Denial of Medical Staff membership, 2) Denial of Requested Advancement in Medical Staff membership, 3) Denial of Medical Staff reappointment, 5) Suspension of Medical Staff membership, or 7) Denial of Requested Privileges of this Article, it shall be incumbent on the person who requested the hearing to initially come forward with evidence in support of this position.

In all cases specified in Section 1 of this Article it shall be incumbent upon the body or committee whose decision prompted the hearing to initially come forward with evidence in support of its action or decision. Thereafter, the burden shall shift to the person who requested the hearing to come forward with evidence in his support.

In all cases in which a hearing is conducted under this Article, after all the evidence has been submitted by both sides, the Judicial Review Committee shall rule against the person who requested the hearing unless it finds that said person has proved, by a preponderance of the evidence, that the action of the committee or body whose decision prompted the hearing was arbitrary, unreasonable, or not sustained by the evidence.

1. Adjournment and Conclusion

The presiding officer may adjourn the hearing and reconvene the same at the convenience of the participants without special notice. Upon conclusion of the presentation of oral and written evidence, the hearing shall be

closed. The Judicial Review Committee shall thereupon, within the time specified in Section 1 (Request for Hearing), Subsection i (The Appeal) of this Article, conduct its deliberations and render a decision and accompanying report as provided by Section 1, Subsection h (Decision of the Judicial Review Committee) of this Article.

SECTION 4. *Appeal to Board of Trustees*

a. Time for Appeal

Within fifteen (15) days after receipt of the decision of the Judicial Review Committee, either the person who requested the hearing or the body whose decision prompted the hearing may request an appellate review by the Board of Trustees. Said request shall be delivered to the Administrator in writing and delivered either in person, or by certified mail, return receipt requested. If such appellate review is not requested within such period, both sides shall be deemed to have accepted the action involved and it shall thereupon become final and shall be effective immediately. The written request of appeal shall also include a brief statement as to the reasons for appeal.

b. Grounds for Appeal

The grounds for appeal from the hearing shall be: [a] substantial failure of the Judicial Review Committee, Executive Committee, or Board of Trustees to comply with the procedures required by this Article or by the hospital Medical Staff Bylaws in the conduct of hearings and decisions upon hearing so as to deny process and a fair hearing; [b] that the decision of the Judicial Review Committee was not supported by substantial evidence.

c. Time, Place and Notice

In the event of any appeal to the Board of Trustees as set forth in the preceding subsection, the Board of Trustees shall, within fifteen (15) days after receipt of such notice of appeal, schedule and arrange for an appellate review. The governing body shall cause the applicant or member to be given notice of time, place and date of the appellate review. The date of appellate review shall not be less than fifteen (15) days, nor more than thirty (30) days from the date of receipt of the request for appellate review.

d. Nature of Appellate Review

The proceedings by the Board of Trustees shall be in the nature of an appellate hearing based upon the hearing of the hearing before the Judicial Review Committee, provided that the Board of Trustees may, in its discretion, accept additional oral or written evidence subject to the same rights of cross-examination or confrontation provided at the Judicial Review Committee hearing. Each party shall have the right to present a written statement in support of his position on appeal, and in its sole discretion, the Board of Trustees may allow each party or representative or legal counsel to personally appear and make oral argument. At the conclusion of oral argument, if allowed, the Board of Trustees may thereupon at a time convenient to itself conduct deliberations outside the presence of the appellate and respondent and their representatives or legal counsel. The Board of Trustees may affirm, modify, or reverse the decision of the Judicial Review Committee, or, in its discretion, refer the matter for further review and recommendation.

e. Final Decision

Within five (5) days after the conclusion of the proceedings before the Board of Trustees, the Board of Trustees shall render a final decision in writing and shall deliver copies thereof to the applicant or member of the Medical Staff and to the Executive Committee in person or by certified mail, return receipt requested.

f. Further Review

Except where the matter is referred for further review and recommendation in accordance with Section 4 (appeal to Board of Trustees), Subsection d (Nature of Appellate Review), the final decision of the Board of Trustees following the appeal procedures set forth in this Article shall be effective immediately and shall not be subject to further review. Provided, however, if the matter is referred back to the Judicial Review Committee for further review and recommendation, said committee shall promptly conduct its review and make its recommendation to the Board of Trustees in accordance with the instructions given by the Board of Trustees. This further review process and the report back to the Board of Trustees shall in no event exceed thirty (30) days in duration except as the parties may otherwise stipulate.

g. Right to One Hearing Only

Except as otherwise provided in this Article, no applicant or member shall be entitled as a matter of right to more than one (1) hearing before the Board of Trustees on any single matter which may be the subject of an appeal without regard to whether such subject is the result of action by the Executive Committee or the Board of Trustees, or a combination of acts of such bodies.

APPENDIX D

SELECTED PORTIONS OF THE TRANSCRIPT OF THE HEARING BEFORE THE APPELLATE REVIEW PANEL

MS. WEST: This is an appellate review by the Appellate review Panel of the hospital's Board of Trustees, per Article IX, Section 4, of the Medical Staff Bylaws. This was requested by Vinod C. Patwardhan to review the decision of the Judicial Review Committee to deny his Medical Staff application for Medical Staff membership and Medical Staff privileges.

I'm Suzanne West. I am an attorney, and I will be acting as the hearing officer tonight.

At this point what I would like to do is have each member of the Board Appellate Panel introduce themselves.

MR. BERT: My name is Dwight Bert.

MR. GLENN: My name is Herschel Glenn, member of the Board of Trustees.

MR. ZWISSLER: Gordon Zwissler, President of the Board of Trustees.

MR. SHERWOOD: Bob Sherwood, member of the Board of Trustees.

MR. BIANE: Rene Biane, member of the Board of Trustees.

MR. BERT: Miss West, I'm also a member of the Board of Trustees. I didn't say that.

MS. WEST: Yes. In order to assure that we have a fair hearing, I have asked and at this point I'm going to ask again each of the members of the Appellate Panel

whether they have participated in any phase of the decision on this application and also whether they have any other kind of bias which might prevent them from making a fair and impartial decision.

And again, if you can answer that question.

MR. BERT: I know of no reason why I would have a bias.

MR. GLENN: The same feeling. I have had no prior involvement. In fact I have never seen Dr. Patwardhan until this evening.

DR. PATWARDHAN: You're lucky.

MR. ZWISSLER: As President of the Board of Trustees, I was involved in the Appellate Hearing January 28 — was that '81? '81. Or was it '81?

DR. PATWARDHAN: No, '80?

MR. ZWISSLER: '80. 1980. I don't feel that this — that I'm biased in one way or another in hearing Dr. Parwardhan's appeal.

MR. SHERWOOD: Yes, I also was on the Board of Trustees at that time and participated in that hearing, but I feel also that I have no bias. This is the first time I've ever seen Dr. Patwardhan, to my knowledge.

MR. BIANE: I too was a member of the Board in 1980, and I feel that I have no bias, and I've yet to meet Dr. Patwardhan until tonight.

MS. WEST: Thank you. In that case, all previous involvement that you had was in 1980 but was not with regard to this third application of Dr. Patwardhan.

MR. SHERWOOD: That is correct.

MR. BIANE: That is correct.

DR. PATWARDHAN: But it was regarding a similar application.

MS. WEST: Pardon me?

DR. PATWARDHAN: It was regarding a very similar kind of application.

MS. WEST: The second application or first?

DR. PATWARDHAN: It was quite similar to this. So the question that I have is: the people who have decided on the first Board meeting for my problem concerning the application to San Antonio Hospital and made the decision, can they also again make a decision under exactly simlar circumstances?

MS. WEST: I think that's probably a question that we will leave on the record for this group to deliberate and determine.

Now, at this point it is 7:52 and Monday, March 21. What I'd like to do is to review the procedure. This was described in a letter dated March 9th that was sent to Dr. Patwardhan, Dr. Cavanaugh and Dr. Carollo, and I have a copy of that letter that we will add to the record, and each member of the Appellate Review Panel received one?

* * *

MR. ZWISSLER: Dr. Patwardhan, for the record, do you feel that this hearing board, this appellate board, is biased and unfair to you, as you've made charges against the Judicial Review Committee?

DR. PATWARDHAN: My basic feeling on the subject is, as I mentioned at the very beginning, that it is very difficult for me to get in this hospital people who are not biased, which I could call it pre-publicity bias.

MR. ZWISSLER: But how would you answer that question? Yes or no, please.

DR. PATWARDHAN: I would tend to feel that your behavior here shows, contrary to the behavior of the Judicial Review Committee, that you are — if you are biased, you're much less biased.

MR. ZWISSLER: Pardon?

DR. PATWARDHAN: If you're biased, you're much less biased.

MR. ZWISSLER: Have you any evidence to indicate that we are biased?

DR. PATWARDHAN: No.

MR. ZWISSLER: Okay. Thank you.

MS. WEST: Have you any questions that you wish to ask of any of the panel members regarding bias?

DR. PATWARDHAN: Regarding bias?

MS. WEST: Yes.

DR. PATWARDHAN: My feeling up until now was that a person who has presided in one hearing on one person automatically becomes a biased decision maker. I am not a lawyer, but I think that's what the law says.

MS. WEST: Do you have any further questions other than the participation in previous applications of some of the Board members?

DR. PATWARDHAN: That's the only one, because I wasn't here during the last hearing so I really don't know what happened.

I really wanted to go further because there's so much more to go into that's so important, and I have one question that I cannot understand and I wish you'd answer that for me. It's a very significant question.

The significant question is: If you cannot listen to me for more than 20 minutes, how can you expect yourself to read the material that is about this thick (indicating) and would take about two or three hours to read? That does not make very much sense to me. And I would prefer not to give you the two or three hours of material and give you a synopsis in one hour. Maybe one and a half hours at the most. I promise I'll make a very good hearing.

MS. WEST: At this point we've had more than a half-hour from you.

Are there any other questions —

MR. BERT: I have no questions.

MS. WEST: — from panel members?

MR. SHERWOOD: I have none.

DR. PATWARDHAN: But if you promise that you will read my material, I can present it to you afterwards too.

MS. WEST: Well, the committee will review the hearing record in its entirety.

DR. PATWARDHAN: But that does not answer any of the things that I have in here.

MS. WEST: They have also received a copy of your request for hearing which sets out a summary of these various points.

There is one further housekeeping matter that I don't think I asked you before. The letter that was sent to you on March 9th and also to Doctors Cavanaugh and Carollo that set out the hearing procedure, which I believe we have made Exhibit A, did you receive a copy of that, Dr. Patwardhan?

DR. PATWARDHAN: Yes.

MS. WEST: And Dr. Cavanaugh?

DR. CAVANAUGH: Yes.

MS. WEST: Dr. Carollo?

DR. CAROLLO: Yes.

MS. WEST: Thank you. If there are no further questions —

MR. RANKIN: Is it appropriate for me to direct Mr. Glenn to the subject he was looking for here in Volume IV?

MR. GLENN: Sure.

MS. WEST: Oh, this is the testimony of the witnesses?

MR. RANKIN: Yes.

MS. WEST: Sure.

MR. RANKIN: Volume IV, Page 148. There are several references to your question in the transcript. Volume IV, Page 148, is the only one I'm able to find.

DR. PATWARDHAN: Is he able to talk?

MS. WEST: He is clarifying a point that was brought up earlier.

MR. GLENN: What line?

MR. RANKIN: Just the second line down. Well, actually the first line.

MR. GLENN: Okay. It reads —

MR. RANKIN: It's by Mr. Miller, the hearing officer:

> "I want to reemphasize that the only attempt you made at bringing witnesses here that we're aware of were Dr. Reddy, Dr. Rodriguez and Dr. Libanoff. You did not indicate there were any more that night. You indicated you had no others ready that night, and the suggestion that you had a parade of wit-

nesses available to you then that you were somehow foreclosed from putting on is simply not the case."

DR. PATWARDHAN: Excuse me. Afterwards, at the end of this hearing, Mr. Miller agreed there were other people. As a matter of fact, I asked one of the people to send a note to Mr. Miller saying that he was present here for the meeting and did not come in, and Mr. Miller finally allowed that contention that they were there.

MS. WEST: Thank you. I Believe that then concludes the hearing portion. This committee will deliberate and present its recommendations to the Board of Trustees, who will make the final decision.

Dr. Patwardhan, this committee will deliberate; then it will present its recommendations to the Board of Trustees, which will make a final decision.

Thank you.

(Exhibit D was marked by the Notary Public.)

Supreme Court, U.S.
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CLERK

No. 85-1931 (2)

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

VINOD C. PATWARDHAN,
Petitioner,

vs.

SAN ANTONIO COMMUNITY HOSPITAL,
a Non-Profit Corporation,
Respondent.

BOARD OF TRUSTEES OF SAN ANTONIO
COMMUNITY HOSPITAL and DOES 1 THROUGH 100,
Real Parties in Interest.

BRIEF OF RESPONDENT AND REAL PARTY IN INTEREST IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

SUZANNE F. WEST
GIRARD, ELLINGSEN, CHRISTENSEN
& WEST
333 South Grand Avenue
Suite 3300
Los Angeles, CA 90071
(213) 613-0453

Attorneys for Respondent and
Real Party In Interest

Bowne of Los Angeles, Inc., Law Printers (213) BOWNE CO

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QUESTIONS PRESENTED

1. Whether the United States Supreme Court has jurisdiction to review the denial of a physician's application for hospital staff privileges based upon the allegation that a private hospital's denial of the application involved State Action affecting a liberty or property right protected by the federal Constitution.

2. Whether the Petitioner's assertions of denial of federal Constitutional protections may be presented originally to the United States Supreme Court when they were not raised before or ruled upon by the California courts.

3. Assuming a physician has a Constitutionally protected interest in whether he may practice at a hospital, whether Due Process:

   A. requires a hospital to allow a physician to be represented by retained counsel at the hearing on his application denial and

   B. forbids a hospital from using its legal counsel as a hearing officer at the board of trustees's review of the hearing committee's decision.

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No. 85-1931

In the Supreme Court

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OCTOBER TERM, 1985

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Petitioner,

VS.

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Respondent.

BOARD OF TRUSTEES OF SAN ANTONIO
COMMUNITY HOSPITAL and DOES 1 THROUGH 100,
Real Parties in Interest.

BRIEF OF RESPONDENT AND REAL PARTY IN INTEREST IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

I

INTRODUCTION

Respondent, San Antonio Community Hospital, and Real Party in Interest, the Board of Trustees of San Antonio Community Hospital, respectfully request that the Court deny Petitioner's Petition for Writ of Certiorari to review the California Court of Appeal decision entered October 22, 1985.

A. JURISDICTION

Petitioner has improperly attempted to invoke jurisdiction under 28 U.S.C. Section 1257(3). The Court lacks jurisdiction to review the California appellate court's decision because the

case does not involve any federal Constitutional rights or federal questions.

II
STATEMENT OF THE CASE

The lawsuit which is the subject of this appeal arises out of the decision of San Antonio Community Hospital ("Hospital") to deny Petitioner's, Vinod C. Patwardhan's, third medical staff application to practice at the Hospital. Petitioner has attempted several times to secure privileges to treat his patients at the Hospital. The first application, submitted in 1976, was denied and Petitioner did not appeal the denial.

The second application, submitted in 1979, was also denied. Petitioner appealed this denial and was given a hearing before the Hospital's Judicial Review Committee. The committee conducted a hearing and in November, 1979, upheld the denial of privileges. Petitioner sought appellate review of this decision by the Hospital Board of Trustees. However, Petitioner chose not to attend the appellate review hearing he had requested and instead elected to protest the decision with a "fast unto death." Petitioner conducted his protest in the Hospital, while the Board of Trustees reviewed the record. The Board of Trustees then affirmed the denial of Petitioner's request for privileges.

Petitioner submitted a third application in February 1981. The Hospital initially refused to process the application, but did so after Petitioner secured a court order requiring the Hospital to review the application.

A careful review of the application was conducted, which included verification of the reference information, interviews with the Credentials Committee, and reviews by the Credentials and Executive Committees. As a result of the review, the Credentials and Executive Committees both recommended denial of the application on the grounds that Petitioner was not competent. Petitioner challenged this decision and was afforded a hearing before a Judicial Review Committee consisting of five physicians. The Medical Staff was represented by two physician representatives and Petitioner was encouraged to secure his own physician representative, but was not allowed to have a lawyer present during the hearing. Petitioner was

informed that this decision did not affect his right to consult with an attorney to prepare for the hearing and he was assisted by an attorney in presenting pre-hearing objections. The hearing was presided over by a hearing officer, Jesse Miller, Esq. After a long hearing, the hearing committee affirmed the denial of privileges.

Petitioner appealed this decision to the Board of Trustees, which appointed an appellate review panel of Trustees to review the decision. The Hospital's legal counsel, Ms. Suzanne West, served as the hearing officer. Petitioner elected not to be represented by his attorney, although the Hospital had granted permission for such representation at the appellate review hearing. Following the conclusion of the appellate review, the panel recommended and the Board of Trustees affirmed the denial of Petitioner's application for medical staff membership.

The Board of Trustees and Judicial Review Committee asserted several grounds for denying Petitioner's medical staff application. In the March 28, 1983 decision of the Board of Trustees (attached hereto as Appendix A), the Board stated the grounds for the denial, including that Petitioner had misrepresented his background to the Hospital by falsely asserting that he was a faculty member of a nearby teaching institution, when he was not, and had been offered a position at a New York medical center, when in fact that hospital had denied his request for continued training. Also, he stated that the state licensing board, the Board of Medical Quality Assurance (BMQA), had concluded its investigation of his practice when in fact he later admitted that he had been told the month before that BMQA would be filing charges against him.

In addition, Petitioner misrepresented his qualifications to the public and other hospitals, by falsely claiming training and qualifications he did not possess.

Further, Petitioner's professional and personal judgment in many cases was extremely deficient. For example, he had attempted to coerce a licensed vocational nurse to administer medications when she was not licensed to do so by instructing the critically ill patient's husband (who was a layman) to administer intravenous chemotherapy. He also used unlicensed personnel in his office to administer intravenous chemotherapy.

Petitioner's medical management and skills were also seriously deficient. He had, for example, failed to recognize and appropriately treat a diabetic coma in one patient, had prescribed fluid administration that could have caused renal failure for another patient, prescribed for a patient suffering from congestive heart failure a drug which could actually worsen the patient's condition, and failed to provide proper care for a patient with severe asthma.

Accordingly, the Judicial Review Committee and the Board of Trustees concluded that ample reason supported the denial of Petitioner's request to practice at the Hospital. This decision was affirmed by the trial court and California's Fourth District Court of Appeal. The California Supreme Court denied Petitioner's petition for certiorari.

III

JURISDICTION

The United States Supreme Court does not have jurisdiction in this case because a private hospital's decision to deny a physician staff privileges does not involve any of the grounds set forth in 28 U.S.C. Section 1257(3), which Petitioner claims provides the basis for the Court's jurisdiction. Section 1257(3) provides for jurisdiction in cases involving the validity of treaties, the federal Constitutionality of a state statute, or where any "title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." 28 U.S.C. Section 1257(3). However, a private hospital's denial of staff privileges does not involve any treaty, statute or federal Constitutional right. Thus, Petitioner has improperly asserted that the Court has jurisdiction of the instant case under 28 U.S.C. Section 1257(3).

A. THIS CASE PRESENTS NO QUESTION OF FEDERAL CONSTITUTIONAL LAW REQUIRING RESOLUTION BY THIS COURT

The threshold inquiry when determining whether a physician has a federal Constitutional right under the Fourteenth and Fifth Amendments is whether State Action was present. In

order to establish a Fourteenth Amendment right, (and in the present case, to demonstrate a Constitutional right), it is necessary to allege that one's Constitutional rights were infringed upon as a result of 'State Action' since the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful." *Blum v. Yaretsky,* 457 U.S. 991, 1002, 73 L.Ed.2d 534, 545, 102 S.Ct. 2777 (1982). A private hospital's decision to deny staff privileges to a physician does not constitute "State Action" which may create rights protected by the Fourteenth Amendment. *Crowder v. J. K. Conlan,* 740 F.2d 447 (6th Cir. 1984). (*See also Hayman v. City of Galveston,* 273 U.S. 414, 71 L.Ed. 714, 47 S.Ct. 363 (1927), in which the United States Supreme Court concluded that a public city hospital's decision to exclude osteopaths was not subject to state or federal Constitutional protection.)

As is discussed below, Petitioner has not demonstrated any nexus between the private Hospital's action and the state so that the Hospital's actions may fairly be treated as those of the state. His mere references to the California statute requiring the Hospital to report adverse privilege decisions to the State do not meet the standards for invoking Fourteenth Amendment protections. Also, his position regarding a private hospital's privilege decision constituting State Action is contrary to the decisions on this issue in all circuits.

Further Petitioner incorrectly asserted (without citing any authority) that "[t]he California courts have held . . . that [medical staff hearings] are subject to the Due Process Clause of the Constitution of the United States." Petition for Certiorari, at 4. California's Courts have held no such thing. In a carefully preserved distinction, the California Supreme Court has indicated that a physician's rights to review of private organizations' staff decisions "arise from the common law rather than the Constitution as such; although *Pinsker I* utilized 'due process' terminology in describing defendant associations' obligations, the 'due process' concept is applicable only in its broadest, nonconstitutional connotation." *Pinsker v. Pacific Coast Society of Orthodontists,* 12 Cal.3d 541, 550, 116 Cal.Rptr. 245, 526 P.2d 253 (1974). Thus, California courts have consistently indicated that physicians' staff privileges may not be refused or restricted "in the absence of a procedure comporting

with the minimum *common law* requirements of procedural due process . . ." *Anton v. San Antonio Community Hospital,* 19 Cal.3d 802, 815, 140 Cal.Rptr. 442, 567 P.2d 1196 (1977) (emphasis added). They have specifically not held that any review rights stem from Constitutionally protected rights, under either the California or the Federal Constitution.

B. STATE ACTION AND CONSTITUTIONAL ANALYSIS

The Fourteenth Amendment's guarantee of Due Process applies to Petitioner's claim only if he can show that the Hospital's action in denying him membership on its medical staff was tantamount to action by the State of California. Recently, in *Blum v. Yaretsky,* 457 U.S. 991, 102 S.Ct. 2777, 73 Ed. 2d 534 (1982), the Supreme Court reiterated the rationale for Constitutional State Action analysis:

> "The Fourteenth Amendment . . . provides in part that '[n]o State shall . . . deprive any person of life, liberty, or property without due process of law.' Since this Court's decision in the Civil Rights cases . . . 'the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States.' *Shelley v. Kraemer* . . . 'That amendment erects no shield against merely private conduct, however discriminatory or wrongful.' Ibid." 457 U.S. at 1002-1003 (citations omitted).

In *Blum,* the Supreme Court held that private nursing homes' decisions to transfer patients without notice or an opportunity to be heard did not constitute State Action. In so holding, the Court rejected the Medicaid patients' claim that the actions were State Action because the State had mandated that the private nursing homes periodically assess what level of care the patients required and adjusted the amount of state payments for the services based upon the nursing homes' decisions. 457 U.S. at pp. 993-996.

The plaintiffs in *Blum* alleged that the nursing home procedures and the state process did not give them adequate notice of the nursing homes' decisions or of their right to an administrative hearing, in violation of their rights under the Due Process clause of the Fourteenth Amendment. 457 U.S. at pp. 993-996.

The United States Court of Appeals for the Second Circuit affirmed the District Court's grant of an injunction, holding that the facilities' decisions " 'involve state action affecting constitutionally protected property and liberty interests.' " *Id.*, quoting 629 F.2d at 820. The Supreme Court noted that the Court of Appeals "premised its identification of state action on the fact that state authorities 'responded' to the challenged transfers by adjusting the patients' Medicaid benefits, *Id.*, which 'establish[ed] a sufficiently close "nexus" between that State and either the nursing homes or the URC's to justify treating their actions as those of the State itself.' " *Id.*

The Supreme Court reversed, finding that the plaintiffs had failed to establish "State Action" in the nursing homes' decisions to transfer or discharge patients because "[t]hose decisions ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State." *Blum,* 457 U.S. at 1008. The Court based its opinion on the principles applicable to claims of State Action against private parties. Initially the Court noted, " '[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the state for purposes of the Fourteenth Amendment,' " *Id.* at 1004, quoting *Jackson v. Metropolitan Edicon Co.,* 419 U.S. 345, 350, 42 L.Ed.2d 477, 95 S.Ct. 449 (1974). The Court held that "[t]he complaining party must show that 'there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as the action of the State itself.' " 457 U.S. 1004, quoting *Jackson, supra,* at 351. The court concluded that "[t]he purpose of this requirement is to assure that Constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." 457 U.S. at 1004 (emphasis in original).

The Court explained that:

> "our precedents indicate that a state normally can be held responsible for a private decision only when it has exercised *coercive power* or has provided such *significant encouragement,* either overt or covert, that the choice must in law be deemed to be that of the state . . . Mere approval of or acquiescence in the initiative of a private party is not

> sufficient to justify holding the state responsible for those initiatives under the terms of the Fourteenth Amendment." *Id.* (Emphasis added.) (Citations omitted.)

Also, it indicated that the nexus mentioned above "may be present if the private entity has exercised powers that are traditionally the exclusive prerogative of the State." *Id.* at 1005.

The Supreme Court held that the Court of Appeals' finding of State Action could not withstand analysis under these three principles. Noting that the lower court based its reasoning on the fact that the State "responded" to those decisions by adjusting the patient's Medicaid benefits, the Court stated:

> "Respondents, however, do not challenge the adjustment of benefits, but the discharge or transfer of patients to lower levels of care without adequate notice or hearings. That the State responds to such actions by adjusting benefits does not render it *responsible* for those actions. The decisions about which respondents complain are made by physicians and nursing home administrators, all of whom are concededly private parties. There is no suggestion that those decisions were influenced in any degree by the State's obligation to adjust benefits in conformity with changes in the cost of medically necessary care." *Id.* (Emphasis in original.)

Like that of the plaintiffs in *Blum,* Petitioner's claim of State Action must also fail. Petitioner has not sued California, but rather the Hospital, a private entity, claiming that its actions were State Action, even though the State was not directly involved in any aspect of the decision to deny him staff privileges. Moreover, Petitioner cannot demonstrate that any of the standards articulated by the court in *Blum* have been met.

First, that a private hospital is subject to state regulation is insufficient to show State Action. Thus, Petitioner has not demonstrated State Action simply by referring to the state regulations that control the judicial review of physician application cases, provide immunity from liability for physicians participating in peer review, and provide immunity from discovery for the Committee's records. Petition for Writ of Certiorari, pp. 4-5. (Contrary to Petitioner's assertion, there is no California legislation which "controls . . . how the proceedings are con-

ducted" *Id.*, p. 4.) None of these regulations involve the state in the actual action, which is the hospital's decision to deny staff privileges.

Similarly, contrary to Petitioner's assertion (Petition for Certiorari, p. 6), the hospital's action is not transformed into State Action merely because California law requires private hospitals to report denials of staff privileges to the state licensing authority, which then shares this information with other hospitals. Like the state agencies in *Blum* responsible for Medicaid administration, California physician licensing authorities *respond* to the action of the private entity, the hospital. Petitioner is not challenging the state reporting statute, but instead the hospital's decision (denial of privileges) that gives rise to the reporting requirement. Thus, as in *Blum*, the fact that the state responds to the hospital's decision does not make the state responsible for the decision, which is made by members of hospital medical staff committees and the hospital's governing board of trustees on the basis of their private standards of medical competency.

Second, there is no coercive power, or even any significant encouragement, on the State's part that petitioner can allege with regard to the denial of his request for medical staff privileges. Third, the powers exercised by the Respondent in this case (to grant or deny medical staff membership) are not powers that are traditionally the exclusive prerogative of the state. Rather, they are powers traditionally exercised by private hospitals like Respondent.

In the context of medical staff privilege decisions of hospitals, all of the federal judicial circuits considering the issue have concluded that private hospital decisions do not constitute State Action. These courts have adopted rules consistent with the State Action analysis of *Blum*. For example, in *Goss v. Memorial Hospital System*, 789 F.2d 353 (5th Cir. 1986), a physician whose medical staff privileges were suspended brought action against the hospital under 42 U.S.C. Section 1983, claiming that the hospital's conduct denied him procedural Due Process, basing his claim on many of the same grounds that Petitioner herein relies on. The *Goss* plaintiff's theory was that hospital acted under color of state law when it expelled him from the Medical Staff by acting under the authority of the

Texas Medical Practice Act. This act, much like California law, required review of physicians' qualifications for staff privileges and authorized a medical peer review committee to report its findings to the Texas State Board of Medical Examiners. It also provided immunity from liability for peer review committee members, as does California law. (See *California Civil Code* Sections 43.7, 43.8.)

The United States Court of Appeals for the Fifth Circuit held that the hospital's peer review actions did not constitute State Action. In order to be considered State Action, the court held, there would have to exist a "nexus" between the acts of the peer review committee members and the state "such that appellees' conduct is "fairly attributable to the state.' " 789 F.2d at 356, quoting *Rendell-Baker v. Cohn,* 457 U.S. 830, 838, 102 S.Ct. 2764, 2770, 73 L.Ed.2d 418 (1982). In order to be so attributable, the state must have "exercised coercive power or [have] provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the state," *Id.,* quoting 457 U.S. at 840 (citations omitted). *See also, Lubin v. Crittenden Hospital Association et al.,* 713 F.2d 414 (8th Cir. 1983) *cert. den.,* 465 U.S. 1025, 79 L.Ed.2d 685, 104 S.Ct. 1982 (1984) (no nexus between state's relationship to operation of private hospital, which leased land and building owned by county, and disciplinary action taken against a physician so as to justify attribution of challenged action of the hospital to the state). The actions of Respondent herein likewise are not "fairly attributable to the state," nor is there any exercise of "coercive power" or "significant encouragement" sufficient to qualify Respondent's actions against Petitioner as an action of the state.

All other circuits are in accord with *Goss* in requiring the showing of a nexus between the activity complained of and the state and concluding that none exists in the context of private hospital privilege decisions. See, e.g., *Hodge v. Paoli Memorial Hospital,* 576 F.2d 563 (3d Cir. 1978) and citations therein (private hospital's receipt of federal construction funding, Medicare and Medicaid funds, and existence of tax exemption, as well as state licensing requirements for nonprofit hospitals, did not constitute State Action under Civil Rights Act of 1871); *Madry v. Sorel,* 558 F.2d 303, *reh.den.,* 561 F.2d 831 (5th Cir.

1977) *cert.den.,* 434 U.S. 1086, 55 L.Ed.2d 791, 986 S.Ct., 1280, *reh.den.,* 435 U.S. 982, 56 L.Ed.2d 76, 98 S.Ct. 1634 (1978) (fact that private, non-profit, tax-exempt hospital received financial support from local and federal government and that bylaws allowed public officials to serve as ex officio members of board of governors did not render hospital's actions State Action); *Schlein v. Milford Hospital,* 561 F.2d 427 (2d Cir. 1977) (where hospital was state licensed, regulated by state health department, tax-exempt and empowered by the state to annex contiguous land for expansion, and where state was not shown to have played any part in the formulation or implementation of procedures utilized in deciding applications of staff privileges, and played no role in making the decision itself, there was no State Action and the court lacked subject matter jurisdiction); *Aasum v. Good Samaritan Hospital,* 542 F.2d 792 (9th Cir. 1976) (fact that three of seven board members were publicly appointed, or that hospital was recipient of federal construction funds did not constitute State Action under 42 U.S.C. Sec. 1983); *Briscoe v. Bock,* 540 F.2d 392 (8th Cir. 1976) (action taken by private hospital not necessarily State Action merely because hospital is chartered by state, or because hospital has state-conferred monopoly, or because activities of hospital are strictly regulated by state, or because functions performed by hospital serve public convenience or necessity; there must be nexus between state and challenged action); *Watkins v. Mercy Medical Center,* 520 F.2d 894 (9th Cir. 1975) (for state involvement with a private hospital to confer jurisdiction under 42 U.S.C. 1983, the involvement must be with the specific activity of which a party complains and the involvement must be significant); *Jackson v. Norton-Childrens Hospitals,* 487 F.2d 502 (6th Cir. 1973) *cert.den.,* 416 U.S. 1000, 40 L.Ed. 2d 776, 94 S.Ct. 2413 (1974) (mere fact of partial federal funding of private hospital will not give rise to State Action); *accord, Ascherman v. Presbyterian Hospital of Los Angeles,* 507 F.2d 1103 (9th Cir. 1974); *Musso v. Suriano,* 586 F.2d 59 (7th Cir. 1978) *cert. den.,* 440 U.S. 971, 99 S.Ct. 1534, 59 L.Ed.2d 788 (1979).

Although the Sixth Circuit found State Action with respect to some hospital staff decisions,[1] it subsequently determined that private hospital staffing decisions did not involve State Action. In *Crowder v. J.K. Conlan, supra,* 740 F.2d 447, the court rejected a physician's claim that a private hospital's restriction of his staff privileges violated his civil rights on the grounds that the complained of action did not constitute State Action. The Court held that the receipt of government payments, the extensive state regulation of the hospital, the service of public officials on the governing body by virtue of their public positions, and the ownership of the facility by the county were insufficient to warrant a finding of State Action in the hospital's decision to restrict the physician's privileges. The court expressly overruled the cases finding "State Action" in similar circumstances, noting that "the legal reasoning of these cases is no longer valid in light of the Supreme Court's recent holdings in this area of the law." 740 F.2d at p. 449.

Similarly, the Fourth Circuit reconsidered its position in light of the Court's holding in *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 351, 95 S.Ct. 449, 453, 42 L.Ed.2d 477 (1974), and concluded that a private hospital's termination of a physician's staff privileges did not constitute State Action. *Modaber v. Culpeper Memorial Hospital, Inc.,* 674 F.2d 1023 (4th Cir.

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[1]In the Sixth Circuit cases finding State Action, the courts evaluated the many facts reflecting unique ties to government action. In each case, the facts were far more extreme than those alleged by Petitioner. *See, e.g., O'Neill v Grayson County War Memorial Hospital,* 472 F.2d 1140 (6th Cir. 1973) (defendant hospital was county's only such facility, was financed in part by federal construction funds, and operated under a lease from the county, under the terms of which it paid only $1.00 for a fifteen-year lease; and agreed to fulfill all duties and responsibilities incident to hospital's maintenance and operation; that all gifts were to become county property in the event the hospital ceased to exist; and that hospital's board of directors would at all times contain at least one member from each magisterial district of the county) *Chiaffitelli v. Dettmer Hospital Inc.,* 437 F.2d 429 (6th Cir. 1971) (hospital's charter provided that five of nine board members would be public officials, and fourteen per cent (14%) of budget came from public sources); *Meredith v. Allen County War Memorial Hospital Commission,* 397 F.2d 33 (6th Cir. 1968) (hospital commission was appointed by the governing body of the county, and the hospital was the only one in the area, was public, and was financed in part by federal construction funds).

1982). It more recently affirmed this position in *Carter v. Norfolk Community Hospital Assn., Inc.,* 761 F.2d 970 (4th Cir. 1985). Thus, the Fourth Circuit no longer is following the decisions finding State Action in a private hospital's decision to terminate or deny a physician's staff privileges.

In the instant case, Petitioner claims that Respondent wrongfully denied his application for staff membership. However, Respondent's decision to do so is not "fairly attributable to the state." It was Respondent which decided to deny Petitioner's application for membership, not the state. There was no exercise of "coercive power" or "significant encouragement" on the state's part, insofar as that decision was concerned, and Respondent's actions against Petitioner thus cannot qualify as an action of the state.

C. STATE ACTION AND ANTITRUST ANALYSIS

Recent United States Court of Appeals decisions in the antitrust area indicate that medical staff privileges decisions involve State Action. However, the "State Action" analysis applicable in the antitrust suits differs fundamentally from that in the Due Process and Constitutional arena.

In *Patrick v. Burget,* Nos. 85-3759, 85-4071 (9th Cir., filed September 30, 1986), the United States Court of Appeals for the Ninth Circuit held that Oregon peer review proceedings were "State Action" for purposes of Federal *antitrust* analysis. The Seventh Circuit reached the same conclusion in *Marrese v. Interqual, Inc.* 748 F.2d 373 (1984), *cert.den.,* ____U.S. ____, 87 L.Ed.2d 632, 105 S.Ct. 3501 (1985). However, this does not suggest that peer review proceedings are also State Action for purposes of *Constitutional* analysis under the Fifth and Fourteenth Amendments to the United States Constitution. In fact, only the names of the two doctrines are the same. They are completely different in both theory and application.

In antitrust analysis, the doctrine of State Action originated in *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), when a California raisin producer challenged, under the Sherman Antitrust Act, a state statute that authorized "programs for the marketing of agricultural commodities produced in the state, so as to restrict competition among the

growers and maintain prices in the distribution of their commodities to packers." 317 U.S. at 346. The United States Supreme Court, noting that American government is "a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority," held that the Sherman Act was not applicable to activity mandated by state Legislatures, even if such activity had an anticompetitive effect.

Later Supreme Court decisions refined both the aim of the antitrust State Action doctrine and its jurisprudential basis. In *Hoover v. Ronwin,* 466 U.S. 558, 104 S.Ct. 1989, 80 L.Ed.2d 590 (1984), this Court explained that "the state action doctrine is grounded in concepts of federalism and state sovereignty," *Id.,* citing *Community Communications Co. v. Boulder,* 455 U.S. 40, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982). The doctrine is aimed at "the replacing of entirely free competition with some form of regulation or restraint . . . authorized or approved by the State . . . ." 466 U.S. at 568 (citations omitted).

Unlike antitrust State Action analysis, which seeks to determine, based on principles of federalism and state sovereignty, under what special circumstances certain anticompetitive activity will be considered beyond the realm of federal regulation, *Constitutional* State Action is a doctrine that grew out of the Fourteenth Amendment.

The antitrust State Action doctrine is aimed at assessing the state mandate for and supervision of an activity. Thus, it is designed to determine whether an activity is required by the state and adequately supervised by the state and therefore should not be subjected to scrutiny under the federal antitrust laws. It is sufficient, according to *Patrick,* that Oregon's laws require hospitals to perform peer review and provide judicial review of the decisions to exempt the peer review process from antitrust review. In contrast, the Due Process State Action doctrine is designed to determine whether the *action* that was taken was coerced or required by the state. Thus, it is not sufficient that the state requires peer review and provides judicial review of the decisions; a plaintiff must also demonstrate a nexus between the private party's action (such as the denial of staff privileges) and the State Action. In essence, the state must have actively participated in the activity and coerced

the result; not merely have required that the activity be undertaken.

It was only the antitrust, supervision type of "State Action" that the Ninth Circuit found in *Patrick v. Burget. See Patrick, supra,* slip op. at 9, where the court cites to, and relies on, both *Parker* and *Ronwin, supra.* If Petitioner had alleged an unlawful restraint of trade (which he did not), the state's system of medical staff peer review might be found to constitute "State Action" which provides an exemption from antitrust review, and the analysis of the *Patrick, Parker,* and *Ronwin* cases would be applicable (but certainly not helpful) to Petitioner's antitrust case.

Respondent has found no case that applies the antitrust State Action analysis of *Parker* and its progeny to a claim like Petitioner's that seeks to establish Due Process rights under the Fifth and Fourteenth Amendments to the United States Constitution.[2] Instead, the Constitutional standards established by this Court, not the antitrust standards, are those applicable to Petitioner's claim of State Action. It is those standards that Petitioner must, but cannot meet in order to invoke this Court's jurisdiction.

IV

ASSUMING PETITIONER HAS CONSTITUTIONALLY PROTECTED RIGHTS, HE WAS AFFORDED A FAIR HEARING

Assuming, arguendo, that Petitioner has demonstrated a sufficient nexus between the State and the private hospital's decision to deny him staff privileges, the Petition for Writ of Certiorari should nevertheless be denied since Petitioner has not demonstrated that he was not given a fair hearing.

Further, Petitioner failed to raise this issue below. Thus, the California courts did not consider Petitioner's federal Consti-

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[2]Indeed, it is telling that *Patrick,* a Ninth Circuit decision, does not cite to *Aasum, Watkins,* or *Ascherman, supra,* all of which are also Ninth Circuit cases. Presumably, if the court has intended to make a decision affecting Constitutional State Action, it would have at least mentioned those cases.

tutional claims and he cannot meet the standard set forth in the United States Supreme Court Rule 17.1(c), which provides:

> "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> . . .
>
> "(c) When a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

In the present case, the California appellate court was never presented with the questions Petitioner now raises before this court, i.e., whether federal Constitutional principles require hospitals to permit physicians to be represented at medical staff hearings by their retained counsel and whether a hospital's use of its legal counsel to serve as the appellate review hearing officer is improper. Thus, the state has not decided the question and any review is improper.

Even if the questions had been properly presented to the State courts and were properly before this court for review, Petitioner has not demonstrated that he was deprived of a fair hearing, under California common law principles or federal Constitutional due process standards.

A. NEITHER COMMON LAW FAIR PROCEDURE NOR CONSTITUTIONAL DUE PROCESS REQUIRES HOSPITALS TO PERMIT PHYSICIANS TO BE REPRESENTED AT HEARINGS BY RETAINED COUNSEL

Petitioner's primary challenge to the hospital's denial of his medical staff application is based upon his assertion that the Hospital should not be permitted to deny his request to have his attorney present at the hearing. Petitioner claims that the Hospital rule, which gives the hearing committee the discretion to decide whether to permit attorneys to be present at the hearing, and the decision not to permit Petitioner to be so

represented, deprive him of a Constitutional liberty or property right, without Due Process of law. (Petition for Certiorari, pp. 6-12.) However, Petitioner, like the veterans in *Walters v. National Association of Radiation Survivors,* 105 S.Ct. 3180, 87 L.Ed.2d 220 (1985), has failed to demonstrate that Due Process requires the presence of attorneys.

The Court, in *Walters*, established a three part test for evaluating a claim for additional procedural protections in administrative hearings, and specifically for a claim that veterans were being improperly denied a right to be represented by attorneys they retained as a result of a federal statutory $10.00 attorney fee limitation. This Court initially reiterated that " 'due process' is a flexible concept — that the processes required by the Clause with respect to the termination of a protected interest will vary depending upon the importance attached to the interest and the particular circumstances under which the deprivation may occur." 105 S.Ct. at p. 3189, *citing Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976) and *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). The Court noted that "in defining the process necessary to ensure 'fundamental fairness' we have recognized that the Clause does not require that 'the procedures used to guard against an erroneous deprivation . . . be so comprehensive as to preclude any possibility of error." *Id.*, (citation omitted). The Court emphasized that "the marginal gains from affording an additional procedural protection often may be outweighed by the societal cost of providing such a safeguard." *Id.*, (citation omitted).

In light of these fundamental principles, the court indicated that the test to be used to assess requests for procedural protections are those articulated by the court in *Mathews*. These require a court to consider, first, the "private interest that will be affected by the official action," second, "the risk of an erroneous deprivation of such interest through the procedures used," and third, "the probable value of additional or substitute procedural safeguards," and fourth, "the government's interests in adhering to the existing system." *Walters, supra*, 105 S.Ct. at p. 3189. The test is to be used to determine the risk of error as "applied to the generality of cases, not the rare exceptions." *Id.* (Citations omitted.)

In *Walters*, this Court concluded that a statutory $10.00 limit on the fees that could be paid to attorneys representing veterans in veterans benefit disputes did not violate Due Process, even though it effectively deprived the veterans of any legal assistance except the scant volunteer services that were available. In so holding, this Court noted that the government defended the fee limitation by arguing that it protected veterans by assuring that they, rather than attorneys received the benefits and encouraged informality in the hearing process.

This Court found the government interest in reducing adversarial hearings (which the Court found would occur if attorneys were allowed to participate) and thereby minimizing administrative costs must be given great weight. *Id.*, at pp. 3189-3192. It stated that only an extraordinarily strong showing of a probability of error could overcome this interest, and concluded no such showing had been made. *Id.*, at pp. 3192-3193. Further, it found little information to justify any finding that eliminating the fee restriction and thereby allowing the participation of attorneys in the veterans benefit claim cases would result in valuable procedural safeguards. *Id.*, at pp. 3193-3194. Cf. *Parham v. J.R.* 442 U.S. 584, 609-612, 99 S.Ct. 2493, 2507-2509, 61 L.Ed.2d 101 (1979).

The same standards have been applied by the California and other state courts, in reviewing challenges to procedures used for medical staff case review, and specifically, the question of attorney participation in administrative hearings. The California Supreme Court noted that:

> "[t]he common law requirement of a fair procedure does not compel formal proceedings with all the embellishments of a court trial . . . nor adherence to a single mode of process. It may be satisfied by any one of a variety of procedures which afford a fair opportunity for an [affected individual] to present his position." *Pinsker v. Pacific Coast Society of Orthodontists, supra,* 12 Cal.3d 541, 555.

The California Supreme Court has adopted the same four part balancing test for determining whether a procedural protection is necessary to ensure a fair hearing that was used by the United States Supreme Court in *Walters, supra. People v. Ramirez*, 25 Cal.3d 260, 269, 158 Cal.Rptr. 316, 599 P.2d 622

(1979). The Court has employed a similar analysis to determine the requirements of fair procedure. *Anton v. San Antonio Community Hcspital,* 19 Cal.3d 802, 827, 140 Cal.Rptr. 442, 567 P.2d 1162 (1977). Using this analysis, California courts to date have rejected the suggestion that a physician has the right to be represented by retained counsel at peer review hearings regarding privilege denials or terminations. In *Anton, supra,* the California Supreme Court approved Respondent Hospital's bylaw provision governing legal representation, although it also noted that Dr. Anton had failed to request counsel in a timely manner. But, the Court nevertheless indicated that ". . . rendering representation by counsel a matter within the discretion of the judicial review committee is not offensive to the standard of 'minimal due process' which is applicable in proceedings of this kind." 19 Cal.3d at 827 (citations omitted). The Court also indicated that:

> " '. . . counsel would probably not be necessary unless the hospital's attorney is used in the proceeding or the extreme nature of the charges involved indicated that representation by an attorney would be advantageous.' " *Id.,* p. 816 (citation omitted).

Similarly, the court in *Cipriotti v. Board of Directors,* 147 Cal.App.3d 144, 156-157, 196 Cal.Rptr. 367, (1983) upheld the hospital decision despite the terminated physician's objections to the denial of his request to be represented by a lawyer. The court found that the bylaws provided that a lawyer could not appear on behalf of any party in the hearing process; but that petitioner nevertheless was afforded a fair hearing. The court noted that "the hospital should not be hampered by formalities not required by its bylaws nor by due process considerations." *Id.,* at p. 157.

Petitioner's claim that Due Process requires the hospital to allow him to be represented by an attorney at a medical staff hearing must similarly be rejected. First, the California Supreme Court has held that the interests involved in a physician's application for staff privileges are fundamental, but not vested. *Unterthiner v. Desert Hospital District,* 33 Cal.3d 285, 297, 188 Cal.Rptr. 590, 656 P.2d 554 (1983) *cert. denied,* 464 U.S. 1068, 104 S.Ct. 973, 79 L.Ed. 29, 211 (1984). The nature of the tendered issue in medical staff hearings is whether the physi-

cian is "qualified to take on the additional responsibilities involved in a grant of hospital privileges." *Id.*, 33 Cal.3d at 298. California courts have recognized that medical staff hearings "are not for the purpose of punishment, but [are] primarily to protect the public served by the licensee employed by a hospital." *Cipriotti v. Board of Directors, supra,* 147 Cal.App.3d at 157. In this regard, the court emphasized that a hospital must have the freedom to establish high standards of professional work in order to carry out its duty to exercise a high degree of care towards its patients and to minimize its exposure to lawsuits based upon negligence of its staff, a basis for recovery recognized in *Elam v. College Park Hospital,* 132 Cal.App.3d 332, 183 Cal.Rptr. 156, *modified,* 133 Cal.App.3d 94(a) (1982). *Id.*

The competition of the interests of the physician and the hospital was succintly recognized by the Court in *Silver v. Castle Memorial Hospital,* 53 Ha. 475, 485, 497 P.2d 564, 571, (1972):

> "The doctor has an interest in being able to pursue his profession which requires that the necessary facilities be available to him. The hospital is interested in preserving its autonomy and in maintaining quality control in its medical staff. The public's interest lies in the perpetuation of that quality control and in the sense that its services are and remain available to those in need, in the productivity of the hospital." (Footnote omitted.)

Hospitals must be able to carry the burden of evaluating the competency of applicants for staff privileges and members with privileges and providing hearings when privileges are denied or restricted. Thus, hospitals, like the government in *Walters,* have an interest in maintaining the informality of the medical staff peer review proceedings. Both the hospital and the public have an interest in avoiding the burdens of a formal adversary trial in every case involving possible suspension or denial of a physician's privileges. Recognition of a right of the physician to appear with counsel would result in frequent use of hospital counsel, just as this Court in *Walters* found that it would necessitate the government retaining attorneys. Also, as this Court found in *Walters,* the introduction of attorneys would undoubtedly add to the complexity and adversarial nature of

the hearing process. The prospect of additional hours of cross-examination and arguments on objections would discourage participation of physicians who serve voluntarily on the committees entrusted with the initial responsibility for maintaining high standards of care. (See Kessenick, Physicians' Access to the Hospital: An Overview, (1979) 14 U.S.F. L.Rev. 43, 59-61.) As noted in *Cipriotti v. Board of Directors, supra,* 147 Cal.App.3d 144, 157, the primary purpose of proceedings to deny or terminate staff privileges is protection of the public. This purpose will not be served if participation on peer review panels becomes too burdensome to attract competent, active and dedicated physicians.

Second, there is little risk of an erroneous deprivation of rights. In these hearings, when the physician is not represented by counsel, the medical staff also is not represented by counsel. Thus, the hearings, which are held before a panel of physicians, require only the presentation of medical and professional information by physicians. The physicians involved in medical peer review hearings are mature, highly educated individuals, who are relatively well able to present their position. Thus, the absence of counsel presents little risk of erroneous deprivation of privileges. As this Court noted in *Walters,* "it is less than crystal clear why *lawyers* must be available to identify possible errors in *medical* judgment." 105 S.Ct. at p. 3194.

Moreover, the issue is whether the physician is competent to practice at the Hospital. His ability to communicate effectively with his peers is therefore relevant to the merits of the case.

Also, the prohibition against lawyers pertains only to their presence at the hearing. Thus, a physician is entitled to and Petitioner did seek the assistance of legal counsel to prepare for the hearing and present objections to procedural issues. Thus, the complained of restriction is far less harsh than the statutory $10.00 attorney fee limit in *Walters,* which effectively prevents veterans from retaining attorneys for any assistance.

Third, the introduction of lawyers might actually hamper the presentation of evidence, since the issues at a peer review hearing pertain to matters of medical practice and standards. In this situation, representation by another physician may be more effective. (See *Madera v. Board of Education of City of New*

York, 386 F.2d 778, 788 (1967), *cert. denied,* 390 U.S. 1028, 88 S.Ct. 1446, 20 L.Ed.2d 284 (1968). Thus, instead of adding procedural protections, the introduction of lawyers to address medical issues may actually decrease the protections.

Petitioner argues that attorneys should be allowed because the results of the hearings, if adverse to the physician, must be reported to the state licensing board and then to other hospitals where the physician practices or wants to practice. Petition for Certiorari, pp. 10-13. This argument is misplaced, however. To the extent the state reporting statute provides for improper dissemination of information, the proper challenge is to that statute. Moreover, the California courts already have provided appropriate relief for any erroneous decisions, as illustrated by the decision in *Haller v. Burbank Community Hospital,* 149 Cal.App.3d 650, 199 Cal.Rptr. 45 (1983). In that case, the hospital was ordered to withdraw its improperly filed report. Further, no facts in the record below support Petitioner's arguments in the Petition for Writ of Certiorari, pp. 6-11 regarding the effects of the reports on a physician's reputation or other hospitals' staffing decisions.

Also, the nature of the private hospital decision is unchanged simply because a state responds to the decision by taking action. *Blum v. Yaretsky, supra.* (See the discussion in part III-B above.)

Petitioner's arguments regarding the burden of proof is similarly misplaced. The need for procedural protections depends upon the factors cited above, and the imposition upon an applicant of the burden of proving he is competent to exercise the requested privileges does not change the nature of the interests that are affected or the risk of an erroneous deprivation of an individual's rights. *Unterthiner v. Desert Hospital District, supra,* 33 Cal.3d at p. 298.

B. A HOSPITAL'S USE OF ITS OWN ATTORNEY DOES NOT VIOLATE DUE PROCESS

Petitioner has also asserted that he was denied a fair hearing because the Hospital's attorney acted as the hearing officer at the appellate review hearing. The Appellate Court concluded that the choice of the Hospital's attorney to act as the "hearing officer while concurrently representing the Hospital

was not improper as a matter of law." Petitioner's Appendix A, p. 12. The court relied upon the reasoning in *Rowen v. Workers' Comp. Appeals Bd.,* 119 Cal.App.3d 633, 174 Cal.Rptr. 185 (1981) that "in general, the fact that an administrative agency is both accuser and judge is not considered to deprive the accused of due process of law. [Citation.] We see no reason why, this being so, the same trained personnel cannot legally advise and assist the agency in both functions if such assistance does not violate any statutory provisions and if the agency itself makes the decision.' [Citation]" *Id.,* at pp. 640-641.

In *Withrow v. Larkin,* 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975), this Court also concluded that a combination of investigatory and adjudicatory functions was not impermissible. In rejecting a physician's claim that the Medical Licensing Board was prejudiced by its investigation of the facts and therefore could not subsequently adjudicate the issue, the court stated that "[w]ithout a showing to the contrary, state administrators 'are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." *Id.,* 421 U.S. at p. 55, 43 L.Ed.2d at p. 728.

Courts in other jurisdictions which have considered the issue of the use of a hospital attorney in connection with medical staff hearings have not only approved the use of the same attorney as a legal advisor as to fair procedure at the appellate level, but have even concluded that a physician was afforded fair procedure when the hospital's attorney "conducted the investigation, presented the evidence at the various proceedings and was present at the deliberations of the credentials committee when its recommendations were formulated and was also present at the deliberations of the board of trustees when it was determined that plaintiff's staff privileges should be suspended indefinitely." *Koelling v. Board of Trustees of Mary F. Skiff, M.H.,* 259 Iowa 1185, 146 N.W.2d 284, 194-195 (1967). *See also, Ladenheim v. Union County Hospital District.,* 76 Ill.App.3d 90, 394 N.E.2d 770, 774-775 (1979) and *Christihilf v. Annapolis Emergency Hospital Association,* 496 F.2d 174 (4th Cir. 1974). (In *Christihilf,* the court did not criticize the fact that the hospital's attorney had advocated the termination of the physi-

cian's privileges during the medical staff hearing and then advised the governing body during the appellate review.)

Petitioner has cited several cases to support his claim that the hearing officer was impermissibly biased. However, none of the cases are on point since all involve the question of whether the decision-maker, rather than a hearing officer, is impermissibly biased. Four of the cases Petitioner cites involved judges who were responsible for determining guilt or innocence. *Aetna Life Ins. Co. v. LaVoie,* No. 84-1601, ____ U.S. ____, 106 S.Ct. 1580, 89 L.Ed.2d 823 54 U.S.L.W. 4381 (1986) (judge casting a deciding vote on an undecided issue of law had maintained two personal actions involving the same issue); *Tumey v. Ohio,* 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (the judge who determined guilt or innocence was paid for his service only when he convicted the defendant); *Ward v. Village of Monroeville,* 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972), (the town's mayor, who was responsible for the village finances, acted as the judge who assessed the petitioner's guilt for a traffic offense and levied the fine); and *In Re Murchison,* 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955) (a Michigan state judge serving as a one-man grand jury subsequently determined that two witnesses were guilty of contempt and sentenced them based upon events occurring during the grand jury proceedings). The remaining case involved an arbitrator who was responsible for making the decision. *Commonwealth Coatings Corp. v. Continental Cas. Co.,* 393 U.S. 145, 89 S.Ct. 337, 221 L.Ed. 301 (1968) (Arbitrator who made the decision had done $12,000 worth of business with one of the parties.)

Moreover, Petitoner's claims that the hearing officer was biased are unfounded in law or in fact. Petitioner has argued that it is improper for the same attorney to serve as the hearing officer at the appellate review hearing and then defend the decision in the subsequent legal challenges. Petitioner cites no authority to support this proposition and Respondent has found none. That the same attorney was subsequently asked to represent the Hospital in the litigation resulting from the decision does not reflect any particular bias or prejudgment against Petitioner at the time of the appellate review nor any impermissible combination of functions. Without specific facts revealing bias, it contravenes the presumption of honesty and

integrity established in *Withrow, supra,* to suggest that the Hospital attorney would give the Hospital's Board of Trustees legal advice regarding procedural and review matters that was geared toward the pecuniary interests of encouraging litigation rather than a lawful approach to the issues. Further, only interests that are " 'direct, personal, substantial, [and] pecuniary' " will justify disqualification of a judge, and not speculative allegations of such interests. *Aetna, supra,* 54 U.S.L.W. at p. 4385.

As the California Supreme Court explained in *Andrews v. Agricultural Labor Relations Board,* 28 Cal.3d 781, 171 Cal.Rptr. 590, 623 P.2d 151 (1981), the "right to an impartial trier of fact is not synonymous with the claimed right to a trier completely indifferent to the general subject matter of the claim before him." Instead, the Court stated that the concept of bias refers to a mental attitude towards a party to a proceeding, and not a crystallized point of view about issues of law or policy, which "is almost universally deemed no ground for disqualification." The Court pointed out that if an absence of bias required a total absence of preconception in the mind of the judge, " 'no one has ever had a fair trial and no one ever will . . .' " *Id.* at pp. 790-791.

Petitioner also argues that the hearing officer was an advocate against Petitioner. However, the only factual support for this argument is that the hearing officer's law firm filed the opposition to Petitioner's Petition for Writ of Mandate to require the Hospital to process his third application. This involvement is, however, not a reflection of any mental attitude towards Petitioner, as that case was based upon legal principles unrelated to Petitioner's qualifications to practice medicine or the fairness of the hearing procedure he subsequently received. Thus, nothing in the record supports Petitioner's argument that the hearing officer had, prior to or during the appellate review, assumed an advocate position or expressed any opinion regarding the merits of Petitioner's third application or claims of procedural error.

The hearing officer was not the decision-maker, but instead a lawyer who acted as the presiding officer. As the Medical Staff bylaws indicate, this role is limited to:

> "act[ing] to ensure that all participants in the hearing have a reasonable opportunity to be heard, that all competent and available oral and documentary evidence is presented and that decorum is maintained. He shall be entitled to determine the order or procedure during the hearing. He shall have the authority and discretion, in accordance with these Bylaws, to make all rulings on questions which pertain to matters of law and to the admissibility of evidence." Medical Staff Bylaws, Appendix C, p. 6.

Thus, with the limited role of the hearing officer, and the absence of any indications of prejudgment of the merits of Petitioner's claims in connection with his third application, Petitioner has failed to demonstrate grounds for disqualifying the hospital's attorney from acting as the hearing officer.

Petitioner further alleges that the hearing officer demonstrated bias in her ruling that a decision should be delayed and made by the appellate panel on the issue of whether the Board of Trustees members who previously considered Petitioner's second medical staff application should be disqualified from reviewing the third application. This matter was reserved for the appellate panel's consideration. Contrary to Petitioner's claim, the appellate panel, not the hearing officer, did address this issue, finding:

> "it was proper to allow members who had been involved in the consideration of previous applications to participate in the appellate review, both at the appellate review panel level and the Board level, since the composition of the Board is not significantly different than it was in January 1981, [sic] when [Petitioner's] second application was considered. Thus, as a practical matter, the hospital's Board of Trustees necessarily includes members who considered [Petitioner's] second application and this cannot invalidate the Board's authority to conduct an appellate review of the third application." Board of Trustees appellate review decision, Respondent's Exhibit A, p. 2.

This ruling simply reflected the need to weigh facts, which was not the role of the hearing officer, and did not reflect any impermissible prejudgment.

C. PETITIONER IMPROPERLY RAISED THE ISSUE OF THE ALLEGED BIAS OF THE APPELLATE REVIEW PANEL

Petitioner further asserts that Petitioner was denied effective appellate review because three Board of Trustees members reviewing his third application had participated in the review of his second application. This issue was improperly placed before the Court, since it was not addressed in the initial statement of Questions presented. (Petition for Certiorari, p. 1.) In this regard, the United States Supreme Court's Rule 21 requires a Petition for Certiorari to include a statement of questions. It also provides that: "[o]nly the questions set forth in the petition or fairly included therein will be considered by the Court."

Even if the Court finds that this issue has been properly presented, it nevertheless should not grant the Petition for Certiorari based upon this claim since the California Appellate Court properly concluded that it was proper to allow these Trustees to review the case. In this case, the appellate panel conducted the review, but as is required by the Medical Staff bylaws, the entire Board of Trustees was responsible for the appellate review decision. (Medical Staff Bylaws, Petitioner's Exhibit C, Section 4, Appeal to the Board of Trustees, pp. C10-C12.)

As is noted above, the Board of Trustees considered whether some of its members could participate in the appellate review of Petitioner's third application, even though many of the Trustees had also participated in the review of his second application. The Board of Trustees concluded that this was necessary, since the composition of the Board "was not significantly different that it was . . . when [Petitioner's] second application was considered."

It was proper and necessary for the Board of Trustees to review and decide whether Petitioner was qualified for staff privileges at the time of his second application and again when he submitted a third application. Under the rule of necessity, which was referred to by this Court in *Aetna Life Insurance Co. v. LaVoie, supra,* 54 L.W. at p. 4385 (citing *United States v. Will,* 449 U.S. 200, 214, 101 S.Ct. 471, 66 L.Ed.2d 392 (1980)),

allegations of bias must sometimes give way when the allegation would effectively disqualify all of the judges. Applying this rule in the medical staff context, courts have rejected claims that a hospital governing body may be disqualified from acting as an appellate review body on the basis of prior participation in a matter. The courts have determined that it is improper to require withdrawal of board members for reasons of bias when this would make it impossible to decide the question of a physician's privileges as the board is the only body empowered under the bylaws to make such a decision. *Leonard v. Board of Directors, Prowers County Hospital District*, 673 P.2d 1019, 1023 (Colo. App. 1983). *See also Duffield v. Charleston Area Medical Center, Inc.*, 503 F.2d 512, 519 (4th Cir. 1974).

Petitioner's argument that the Board of Trustees did not need to act as the appellate review body requires the Court to ignore the clear language in the Medical Staff Bylaws which gives the entire Board the responsibility for reviewing medical staff peer review decisions. While the recusal of a few members might still leave the Board with a quorum that could decide the matter, the facts in the present case reflect that the Board of Trustees found that its composition had not changed significantly between the time of Petitioner's second application and his third application. Thus, the Board's finding of necessity was proper.

V

CONCLUSION

For each of the foregoing reasons, counsel for Respondent and Real Party in Interest respectfully urge this Court to Deny the Petition for Certiorari.

DATED: November 24, 1986

Respectfully submitted,

GIRARD, ELLINGSEN,
CHRISTENSEN & WEST

By: SUZANNE F. WEST

Attorneys for Respondent
and Real Party in Interest

APPENDIX A

San Antonio Community Hospital
Board of Trustees
Appellate Review Decision

In the matter of
Vinod C. Patwardhan, M.D.

SAN ANTONIO COMMUNITY HOSPITAL

This matter came before the Appellate Review Panel of the Board of Trustees of San Antonio Community Hospital for review and decision. At the request of Vinod C. Patwardhan, M.D., an appellate review hearing was conducted on March 21, 1983, to review the Judicial Review Committee decision dated February 15, 1983. The Judicial Review Committee recommended denial of Dr. Patwardhan's application for medical staff membership and clinical privileges.

The record considered by the Appellate Review Panel consists of the following:

A. Transcript of the Judicial Review Committee hearing which was held on November 15 and 23 and December 7, 1982 and January 11 and February 1, 1983 and all exhibits introduced into evidence at the hearing which were made a part of the hearing record;

B. The decision of the Judicial Review Committee dated February 15, 1983;

C. Dr. Patwardhan's request for appellate review dated February 26, 1983;

D. Letters dated March 9, 1983 from Mr. John L. Towers; March 12, 1983 from Dr. Patwardhan and March 15, 1983 from Mr. D. Mark Rankin, pertaining to the procedure for the appellate review.

The Appellate Review Panel consisted of the following members:

1. Mr. Dwight E. Bert
2. Mr. Rene Biane

3. Mr. Herschel Glenn
4. Mr. Robert Sherwood
5. Mr. Gordon A. Zwissler

Messrs. Zwissler, Sherwood and Biane indicated that they have been involved in the consideration of Dr. Patwardhan's second application to the hospital, but had not been previously involved in any phase of the consideration of the third application. Messrs. Bert and Glenn indicated that they had had no previous involvement at any phase of the consideration of any of Dr. Patwardhan's application. All members indicated that they had not prejudged this matter and had no bias which would prevent them from rendering an impartial decision on the evidence before them. Dr. Patwardhan objected to the participation of the Board of Trustees members who had considered his second application in the Appellate Review of the Judicial Review Committee's decision regarding his third application. However, the Appellate Panel concluded that it was proper to allow members who had been involved in the consideration of previous applications to participate in the appellate review, both at the Appellate Review Panel level and the Board level, since the composition of the Board is not significantly different than it was in January 1981, when Dr. Patwardhan's second application was considered. Thus, as a practical matter, the hospital's Board of Trustees necessarily includes members who considered Dr. Patwardhan's second application and this cannot invalidate the Board's authority to conduct an appellate review of the third application.

Dr. Patwardhan appeared personally at the Appellate Review hearing, apparently having chosen not to be represented by legal counsel. Edward B. Cavanaugh, M.D. and Vincent J. Carollo, M.D. appeared on behalf of the Credentials and Executive Committees. Suzanne F. West, Esq., presided as Hearing Officer.

After considering the entire record, the Appellate Review Panel, on March 21, 1983, unanimously adopted the following findings and conclusions:

FINDINGS:

1. After the Medical Executive Committee informed Dr. Patwardhan that it recommended denial of his application for medical staff membership and clinical privileges, Dr. Patwardhan made a timely request for a Judicial Review Committee hearing.

2. Dr. Patwardhan was given the notice of the charges on October 20, 1982 and the hearing was held on November 15 and 23 and December 7, 1982 and January 11 and February 1, 1983.

3. By letter dated February 15, 1983, Dr. Patwardhan was informed of the Judicial Review Committee's decision and he subsequently made a timely request for appellate review.

4. By letter dated March 9, 1983, Dr. Patwardhan was informed of the procedure to be used for the appellate hearing, including his rights to submit a written statement, to have twenty minutes to make an oral statement, and to be represented by legal counsel. By letter dated March 12, 1983, Dr. Patwardhan asked for unlimited time to present an oral statement. By letter dated March 15, 1983, Dr. Patwardhan was informed he would have only twenty minutes to present an oral statement, but that he could request a postponement of the appellate review hearing to allow him additional time to prepare a written statement. He chose not to request a postponement.

5. The Judicial Review Committee members had not been previously involved in any phase of the consideration of any of Dr. Patwardhan's medical staff applications, had no business or personal relationships which would affect their ability to render an impartial decision on the evidence and had not prejudged the matter. The Committee members conducted themselves properly during the hearing and their questions were appropriate.

6. The hearing officer, Mr. Miller, carried out his responsibilities in an impartial and proper manner.

7. Dr. Patwardhan was allowed to and did call three witnesses who testified on his behalf, introduced documentary evidence from other physicians and testified on his own behalf. The hearing officer properly instructed Dr. Patwardhan not to call witnesses who had no testimony to offer regarding the charges or whose testimony would be cumulative. In view of this

ruling, Dr. Patwardhan voluntarily chose not to call additional witnesses. Dr. Patwardhan was also given the opportunity to and did cross examine the witnesses against him.

8. Dr. Patwardhan was given copies of all the documents the Credentials and Executive Committees relied upon in formulating the charges and/or introduced at the hearing.

9. The evidence alleged to be hearsay evidence included portions of transcripts from the 1979 San Antonio Community Hospital Judicial Review Committee hearing and from the 1980 Pomona Valley Community Hospital Judicial Review Committee hearing. Dr. Patwardhan was given the opportunity to and did cross examine the witnesses at these hearings. This evidence also included reference letters and memorandums describing telephone conversations between Credentials Committee reresentatives and physicians who had worked with Dr. Patwardhan, which were submitted by the medical staff and letters from physicians describing their opinions of Dr. Patwardhan's conduct, which were submitted by Dr. Patwardhan.

10. Dr. Patwardhan's request to have an attorney represent him at the hearing was denied by the Judicial Review Committee. Although Dr. Patwardhan was informed several times, that he could be represented by another physician, he chose not to have such assistance. He did, however, have assistance in preparing for the hearing from an attorney.

11. The Credentials Committee interviewed Dr. Patwardhan twice, which gave him an opportunity to discuss his application before the Credentials and Executive Committees rendered their decisions.

12. The standard of review, as set forth in the Medical Staff Bylaws, Article IX, Section 3(k), requires an applicant to carry the burden of proving he is qualified for staff membership and to demonstrate, by a preponderance of the evidence, that the recommended denial of the application was arbitrary, unreasonable, or not sustained by the evidence.

13. The evidence presented at the Judicial Review Committee hearing supports each and every finding of the Judicial Review Committee set forth in its decision dated February 15, 1983. These findings are hereby adopted and incorporated

herein by reference. It also specifically supports a finding that incidents occuring many years ago remain relevant in view of the evidence which reflect that the problems have continued until the present time.

14. The evidence reflects that Dr. Patwardhan failed to demonstrate that the Judicial Review Committee's decision dated February 15, 1983, was arbitrary, unreasonable, or capricious.

CONCLUSIONS:

1. That the Judicial Review Committee hearing and Appellate Review hearing were conducted in accordance with the procedures required by the Medical Staff Bylaws and in accordance with law.

2. Dr. Patwardhan was given proper notice of the charges against him and of the Executive Committee's recommended denial of his medical staff application.

3. The appellate review was conducted in a proper manner and Dr. Patwardhan was given a full and fair opportunity to present his position.

4. The Judicial Review Committee members and hearing officer were properly selected and were not biased.

5. Dr. Patwardhan was given the opportunity to and did call witnesses, present evidence and cross-examine the witnesses against him.

6. Dr. Patwardhan was given, in a timely manner, copies of all the documents relied upon and presented at the hearing by the medical staff.

7. The parties were properly allowed to introduce all relevant evidence in support of their positions, including evidence which might otherwise be excluded by a court of law as hearsay evidence, as it met the Bylaws standard which allows introduction of such evidence if it is the type of evidence responsible persons customarily rely upon in the conduct of serious affairs. Also, the evidence of testimony from prior hearings does not constitute inadmissible hearsay since Dr. Patwardhan had had the opportunity to cross examine the witnesses.

8. It was proper not to allow Dr. Patwardhan to be represented by an attorney at the hearing.

9. The Credentials and Executive Committees' investigation was conducted in a proper manner.

10. The Bylaws appropriately place the burden of proof on Dr. Patwardhan to prove, by a preponderance of the evidence, that the recommended denial of his applicaton was arbitrary, unreasonable or not sustained by the evidence.

11. The evidence supports the conclusions of the Judicial Review Committee that Dr. Patwardhan engaged in a continuing pattern of misrepresentation, lack of candor and lack of forthrightness in his dealings with the hospital's medical staff, including the 1983 Judicial Review Committee and in dealings with the public and with other medical staffs; engaged in conduct reflecting very poor personal and professional judgment; and exhibited a poor level of medical skills, medical judgment and quality of case management. The conclusions of the Judicial Review Committee, as set forth in the February 15, 1983 decision are adopted in their entirety and are incorporated herein by reference.

12. The Judicial Review Committee's recommendations that Dr. Patwardhan's application for medical staff membership and clinical privileges should be denied is appropriate and responsive to the nature of the deficiencies in Dr. Patwardhan's professional conduct.

13. Dr. Patwardhan's application for medical staff membership and clinical privileges at San Antonio Community Hospital is hereby denied.

Dated: March 25, 1983

GORDON A. ZWISSLER
Chairman, Appellate Review Panel

Approved and adopted by the San Antonio Community Hospital Board of Trustees on March 28, 1983.

Dated: March 28, 1983

GORDON A. ZWISSLER
President, Board of Trustees

February 15, 1983

Medical Staff Executive Committee
San Antonio Community Hospital
999 San Bernardino Road
Upland, California 91786

SAN ANTONIO COMMUNITY HOSPITAL

Re: Decision and Report of Judicial
Review Committee —
Vinod C. Patwardham, M.D.

Gentlemen:

Commencing on November 15, 1982 at 7:00 p.m., and continuing on four additional evenings, concluding on Fedruary 1, 1983, the Judicial Review Committee, of which I am the Chairman, conducted a hearing requested by Dr. Vinod C. Patwardhan. The Judicial Review Committee heard evidence in support of the recommendation of the Executive Committee to reject Dr. Patwardhan's application for medical staff membership, as well as the evidence offered by Dr. Patwardhan in support of his position that his application should have been approved.

Dr. Patwardhan appeared personally and represented himself. Dr. E. B. Cavanaugh representing the Credentials Committee and Dr. V. J. Carollo representing the Executive Committee presented the Executive Committee's evidence. Jesse D. Miller, Esq. served as the Hearing Officer in accordance with the San Antonio Community Hospital Medical Staff Bylaws, and the hearing was conducted in accordance with said Bylaws.

The Judicial Review Committee originally consisted of the following staff physicians in addition to me as Chairman: S. D. Proffitt, M.D.; L. F. Potts, M.D.; M. J. Rosenthal, M.D.; J. D. Santaniello, M.D.; T. M. Barrett, M.D.; M. Kolber, M.D. and R. N. Fabricant, M.D. (alternate). During the course of the hearing, Drs. Proffitt, Santaniello and Potts excused themselves from the Committee, leaving five members of the Commit-

tee as required by the Bylaws. All five members remaining on the Committee were present at all times during the hearing and they were the only members who participated in the Committee's deliberations and who voted on this Decision.

During the hearing, all parties, including Drs. Patwardhan, Carollo and Cavanaugh agreed that this Decision and Report could be completed within fifteen (15) days of the conclusion of the hearing, rather than within five (5) days as otherwise would be required by the Bylaws.

Documentary evidence was introduced during the hearing by both parties. The Executive Committee introduced a booklet of "Medical Staff Representative Exhibits" numbered 1 through 28. Dr. Patwardhan introduced a booklet of "Exhibits of Vinod C. Patwardhan, M.D.," with documents under tabs lettered A through XYZ. In addition, Dr. V. C. Patwardhan offered a number of other Exhibits, all of which have been assigned letters and are attached to and made a part of the official transcript of the hearing prepared by Deanna Tunstall, Certified Shorthand Reporter.

In addition to the written evidence received at the hearing from both parties as described above, oral testimony was received from a number of witnesses on behalf of Dr. Patwardhan and on behalf of the Executive Committee. The testimony of these witnesses has also been transcribed and made a part of the official transcript by Ms. Tunstall.

Following the adjournment of the hearing, the five members remaining on the Judicial Review Committee met and came to a unanimous decision. That decision, and the reasons justifying that decision, are set forth below.

DECISION

The Judicial Review Committee, based upon all evidence presented at the hearing requested by Vinod C. Patwardhan, M.D., conducted between November 15, 1982 and February 1, 1983, has decided that the decision of the Executive Committee to recommend rejection (denial) of Dr. Patwardhan's application dated February 19, 1981, for staff membership, was

sustained by the evidence and under all the circumstances of this case was not arbitrary or unreasonable.

STATEMENT OF REASONS

On February 19, 1981, Dr. Patwardhan applied for medical staff membership at San Antonio Community Hospital. On September 22, 1982, he was notified in writing of the recommendation of the Executive Committee that his application be rejected. He was also notified in the September 22, 1982 letter of his right to request a hearing by a Judicial Review Committee.

Dr. Patwardhan requested such hearing by a letter from his attorney, John Chakmak, received by the Hospital on October 5, 1982. By letter of October 20, 1982, Dr. Patwardhan was notified of the hearing date and was given written notice of the reasons for the Executive Committee's decision. These reasons and the evidence in support thereof and opposition thereto were reviewed by the Judicial Review Committee in this hearing. In its deliberations, this Committee was particularly mindful of that portion of Article VIII, Section 2j, which reads as follows:

> "In all cases in which a hearing is conducted under this Article, after all the evidence has been submitted on both sides, the Judicial Review Committee shall rule against the person who requested the hearing unless it finds that said person has proved, by a preponderance of the evidence, that the action of the committee or body whose decision prompted the hearing was arbitrary, unreasonable, or not sustained by the evidence."

The reasons stated by the Executive Committee consist of four main categories:

> 1. "Continuing pattern of misrepresentation/lack of candor/lack of forthrightness in dealings with the Medical Staff of San Antonio Community Hospital. . . ."
>
> 2. "Misrepresentation/lack of candor/lack of forthrightness in dealings with the public and with other medical staffs. . . ."

3. "Conduct calling into serious question the level and quality of . . . [Dr. Patwardhan's] personal and professional judgment. . . ."

4. "Information calling into serious question. . . .

[Dr. Patwardhan's] level of medical skills, medical judgment and quality of case management. . . ."

These reasons (or charges) will be considered one by one.

1. "Continuing pattern of misrepresentation/lack of candor/lack of forthrightness in dealings wih the Medical Staff of San Antonio Community Hospital. . . ."

The Judicial Review Committee finds that this reason (or charge) was sustained by the evidence, and was not arbitrary or unreasonable. This reason (or charge) relates to Dr. Patwardhan's dealings with this Hospital.

There is evidence that in his 1976 Medical Staff Application, in statements made to the Credentials Committee and in testimony at a 1979 Judicial Review Committee hearing (all at San Antonio Community Hospital) that Dr. Patwardhan misrepresented certain facts.

For example, he stated that he was on the faculty of the Department of Medicine at Loma Linda University. Letters from that institution state unequivocally that he was never on that faculty. Even Dr. Patwardhan admitted that he had falsely represented such faculty position on an applicaton to this Hospital, and elsewhere.

Another example, of a lack of candor or misrepresentation concerned his relations with Maimonides Medical Center in Brooklyn. Dr. Patwardhan had claimed that he had not had any problems with Maimonides and that he had been offered a staff appointment there. Correspondence from that institution indicates that Dr. Patwardhan's performance there was unsatisfactory, that Dr. Patwardhan had never been offered a staff appointment there and further that Dr. Patwardhan's application for an additional year of fellowship in Oncology had been refused.

The evidence indicated that Dr. Patwardhan had made similar misstatements on applications to Pomona Valley Commu-

nity Hospital and to a Judicial Review Committee of that hospital.

The evidence indicated that Dr. Patwardhan has dealt with this Hospital with a lack of forthrightness and candor in the past and many of his own statements and admissions at this Judicial Review Committee confirm a continuing pattern in this regard.

> 2. "Misrepresentation/lack of candor/lack of forthrightness in dealings with the public and with other medical staffs . . . ."

The Judicial Review Committee finds that this reason (or charge) was sustained by the evidence, and was not arbitrary or unreasonable. This reason (or charge) relates to Dr. Patwardhan's dealings with the public and other hospitals.

There is evidence that Dr. Patwardhan misrepresented his credentials in "flyers" promoting his speaking engagements at a 1976 Chaffey College lecture and at a 1976 Doctors' Hospital of Montclair lecture. There is also evidence of misrepresentation of his credentials on a 1976 Medical Staff Application to Pomona Valley Community Hospital.

> 3. "Conduct calling into serious question the level and quality of . . . [Dr. Patwardhan's] personal and professional judgment. . . ."

The Judicial Review Committee finds that this reason (or charge) was sustained by the evidence, and was not arbitrary or unreasonable. This reason (or charge) relates to the level and quality of Dr. Patwardhan's personal and professional judgment.

The evidence, in the opinion of this Committee, not only calls Dr. Patwardhan's judgment into "serious question" but demonstrates very poor judgment, sufficient to deny him staff privileges.

The evidence is clear (and it is admitted by Dr. Patwardhan) that in order to coerce a licensed vocational nurse, not legally authorized to do so, to administer intravenous therapy, Dr. Patwardhan instructed the husband (a layman) of a critically ill patient to administer said intravenous therapy.

The evidence is also clear, and admitted by Dr. Patwardhan, that he engaged in a "hunger strike" on the premises (and later in close proximity to the premises) of San Antonio Community Hospital for about 9 days. There is evidence that this interfered with the administration of this Hospital and required police assistance to remove him from the premises. Even Dr. Patwardhan admitted that this conduct was inappropriate and unprofessional. This Committee does not philosophically oppose Dr. Patwardhan's right to protest as he sees fit, but doing so at this "location" seems a serious error in judgment.

There is also evidence that Dr. Patwardhan permitted a non-professional employee to give intravenous chemotherapy, even though that employee was neither formally trained nor licensed to do so. Dr. Patwardhan admits these facts. This Committee concludes that whether or not this conduct is a violation of law, it is poor professional judgment.

> 4. "Information calling into serious question . . . [Dr. Patwardhan's] level of medical skill, medical judgment and quality of case management. . . ."

The Judicial Review Committee finds that this reason (or charge) was sustained by the evidence, and was not arbitrary or unreasonable. This reason (or charge) relates to Dr. Patwardhan's medical skills, medical judgment and quality of case management.

There is evidence of dissatisfaction with Dr. Patwardhan's medical knowledge, medical judgment and medical performance at his former training and employment facilities. These consist of letters, memos of interviews and proctor reports. There is evidence to sustain a finding of case mismanagement of a hysterectomy patient at Doctors' Hospital of Montclair in 1977, and of a leukemia patient at Doctors' Hospital in Montclair in 1979. There is further evidence to sustain a finding of mismanagement of three specific patients (Charts No. 1064105, 1071189 and 1065718-7) at Pomona Valley Community Hospital. These involve inadequate history and physical, failure to initiate proper diagnostic studies and inadequate treatment of patients.

Based upon all of the foregoing, the Judicial Review Committee unanimously decided that the recommendation of the Executive Committee to reject Dr. Patwardhan's Medical Staff Application is not arbitrary or unreasonable and is sustained by the evidence.

Very truly yours,

ALAN G. MCPHERSON, M.D.
Chairman, Judicial
Review Committee

/jt
cc: Board of Trustees
Vinod C. Patwardhan, M.D. —
Certified Mail #P314766789

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On November 24, 1986, I served the within Brief in Opposition to Petition for a Writ of Certiorari in re: "Vinod C. Patwardhan vs. San Antonio Community Hospital" in the United States Supreme Court, October Term, 1985, No. 85-1931;

on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Lawrence Silver, Esq.
Wilshire-Doheny Plaza, West Tower
9100 Wilshire Blvd., Ste. 360
Beverly Hills, CA 90212

All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on November 24, 1986, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA

Subscribed and Sworn to before me this 24th day of November, 1986.

My Commission Expires October 27, 1990.

June A Mason

Notary Public

OFFICIAL SEAL
JUNE A MASON
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires OCT 27, 1990